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Supreme Court, U.S.
FILED

No. _____

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In The

Supreme Court of the United States

JOHN P. MEINHARDT, for himself
and all others similarly situated, *et al.*,

Petitioners,

v.

UNISYS CORPORATION, *et al.*,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should mixed questions of law and fact be reviewed *de novo* on appeal, as some courts of appeals have concluded, thereby promoting consistent results and developing uniform precedent, or should a more deferential standard giving presumptive force to the trial court's decision be applied, as other courts of appeals have concluded?

II. Does the fact that a district court is conducting a bench trial alter the reliablity, fit and qualifications requirements so that immediately following *voir dire* a trial judge may exclude expert testimony on the basis of credibility or other factors that normally go to the weight of the evidence, rather than its admissiblity?

LIST OF PARTIES AND RULE 29.6 LIST

The petitioners are John Meinhardt, Michael Heck, Joseph McCarthy, Angelo DiPietro, Gary Vala, Carolyn Gohlike, Dennis C. Stanga, James M. Collins, John H. Burgess, Jr., Bernard McDevitt, Parker Kean, Nadia F. Sos, Farouk M. Sos, Kenneth Goers, John J. Cieslicki, William Torkildson, Henry Zylla, Richard Silver, Ronald Grippo, Edward Lawler, Richard Andujar, Clarence Muller, Charles Wahler, James McLaughlin, Donald Rader, Joseph Lau, James Gangale, Alfred Contarino, Richard Colby, John Marcucci, Joseph Fiore, Richard Mastrodomenico, Nick Klemenz and Peter Szczybek. The petitioners are collectively referred to as Plaintiffs or the Participants. The Plaintiffs represent a certified class of participants in the defined contribution pension plans of Unisys Corporation.

The respondents are Unisys Corporation, the Administrative Committee of the Unisys Savings Plan, the Investment Committee of the Unisys Savings Plan, Jack A. Blaine, John J. Laughlin, Kenneth L. Miller, David A. White, Stefan Riesenfeld, Michael R. Losey, Curtis A. Hessler, Edwin P. Gilbert, Thomas Penhale, Richard H. Bierly, Leon J. Level, and George T. Robson. Respondents are sometimes collectively referred to as Unisys.

Unisys Corporation has no parent. Its subsidiaries, other than wholly-owned subsidiaries, are Nihon Unisys Ltd. and Oki Unisys Kaisha, Ltd.

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PETITION FOR A WRIT OF CERTIORARI

The Participants respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals that gives rise to the questions presented is reported as *In re Unisys Sav. Plan Litig.*, 173 F.3d 145 (3d Cir. 1999) (hereinafter *Unisys II*), and is reproduced in the appendix. (App. 1-66). The district court's opinion which the court of appeals affirmed is reported as *In re Unisys Sav. Plan Litig.*, 1997 U.S. Dist. LEXIS 19198 (E.D. Pa. Nov. 24, 1997), and is reproduced in the appendix. (App. at 73-146). The order of the court of appeals denying the Participants' petition for rehearing is reported at 173 F.3d 145, 174 (3d Cir. 1999), and is reproduced in the appendix. (App. at 147-53). The court of appeals had previously reversed the grant of summary judgment in favor of Unisys; that opinion is reported as *In re Unisys Sav. Plan Litig.*, 74 F.3d 420 (3d Cir.) (hereinafter *Unisys I*), *cert. denied*, 519 U.S. 810 (1996).

JURISDICTION

The judgment of the court of appeals was filed on March 22, 1999. (App. at 67-72). A timely petition for rehearing was denied by order dated April 30, 1999. (App. at 147-53). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statutory provisions, 28 U.S.C. § 1291 and Rule 702 of the Federal Rules of Evidence, are set forth in the appendix. (App. at 154).

STATEMENT OF THE CASE

This case was brought by the Participants asserting claims for breach of fiduciary duty under ERISA against fiduciaries of defined contribution pension plans sponsored by Unisys Corporation. The district court had subject matter jurisdiction pursuant to section 502 of ERISA, 29 U.S.C. § 1132, and 28 U.S.C. § 1331.

The claims that Petitioners asserted involve the decision of Respondents, acting as pension plan fiduciaries, to acquire three guaranteed investment contracts from the Executive Life Insurance Company of California ("Executive Life"), which later became insolvent. At the time the contracts were selected, Respondents knew that Executive Life had a controversial policy of investing in the junk bond market to a much greater degree than any other insurance company. Respondents knew that the chairman of Executive Life had a marred reputation. Respondents knew that the contracts were for two investment funds that were considered to be the most conservative investment funds in the plans. Despite this knowledge, Unisys did little investigation into the merits of the investments. David White, the individual who decided to acquire the Executive Life contracts, testified that "we did not specifically undertake credit analysis, nor assess any specific risks of default. We relied on the various rating agencies." Joint Appendix at A01019, *Unisys II*. On this

basis, Respondents selected Executive Life contracts totalling over two hundred million dollars at three bids between June 1987 and January 1988.

The first bid occurred in June 1987 at the offices of Murray Becker, a consultant. While the consultant sent out bid requests and narrowed the list of bidding companies, he explicitly advised Unisys that he did not perform any credit analysis. Unisys did not investigate any of the bidding companies. Unisys relied entirely on Becker, but no one analyzed the basis of Becker's work, his process, or his criteria for inviting companies to the bid. Joint Appendix at A01023-27, *Unisys II*.

The second bid took place in December 1987 at Unisys; Respondents handled the bid themselves, as they had terminated Becker's consulting contract. Relying on the Standard & Poor's rating and conducting no research, White committed over 135 million dollars into another five year contract from Executive Life. The third bid, for a newly-formed fund, took place in January 1988 at Unisys. Again, White did no research into the creditworthiness of Executive Life. Joint Appendix at A01019-20, *Unisys II*. Nonetheless, he committed all of the assets of this fund, forty-eight million dollars, to a five year Executive Life contract to obtain the highest rate.

In early 1990, Executive Life took a 550 million dollar writedown of its junk bond portfolio, which led to a downgrade of its credit ratings. Executive Life's worsening condition ultimately led the California Commissioner of Insurance to seize it, placing it in conservatorship on April 11, 1991. As a result, Unisys froze the balance of every account invested in the Executive Life contracts, and this case was commenced.

After the court of appeals vacated a grant of summary judgment in favor of the Respondents, the matter was remanded for trial. *See Unisys I*, 74 F.3d at 448. At trial, the Plaintiffs offered George Gottheimer, an insurance consultant, to testify on the customary methods used to investigate the creditworthiness of insurance companies. (App. at 22); (*see also id.* at 62-63 n.18) (Becker, C.J., dissenting) (quoting proffer). During *voir dire* examination, Gottheimer described his professional experience in the insurance field, his various degrees in insurance, his membership in professional insurance societies, his status as a professor at the College of Insurance, and his experience as a consultant evaluating the financial condition of both life insurance and property/casualty insurance companies.[1]

After cross examination on *voir dire*, Unisys objected to Gottheimer's qualification, asserting that "[h]is very considerable experience seems to lie in the area of property and casualty insurance and the area of reinsurance." (App. at 187-88). The trial court sustained this objection, explaining that "the specific issues before me as the trier of fact in this case are inconsistent with your training, your experience, your education, as impressive as it is. . . . " (App. at 188). The court did not make any comment on Gottheimer's credibility at that time. Several months after the trial, the district court filed findings of fact and conclusions of law that were taken nearly word-for-word from the proposed findings of Unisys.[2] The

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[1] The transcript of the *voir dire* examination is included in the appendix. (App. at 155-90).

[2] With the exception of some introductory sentences and a few other cosmetic changes, the district court adopted

findings adopted by the trial court articulated two additional reasons for its refusal to qualify Gottheimer: the trial court noted that Gottheimer had supplemented his bachelors and masters degrees in insurance with a self-directed doctoral degree, which the court characterized as a degree from a correspondence school, and the court commented that "if given the chance to testify, I could not find him to be a credible witness. . . . " (App. at 133).

On the merits, the trial court adopted Respondents' view that their investment decisions should be subject to deferential review. (App. at 126) ("ERISA's causation requirement, contained in section 409(a), 29 U.S.C. § 1109(a), commands an inquiry into whether there is ***any*** objective evidence of prudence. If such evidence is present, a fiduciary cannot be held liable in damages.") (emphasis supplied); (App. at 130) ("given the deference owing to the fiduciaries, if reasonable minds could differ on the prudence of Unisys' investments, Unisys is entitled to judgment in its favor."). Based upon this standard, the trial court concluded that the defendants had acted prudently. (App. at 128-31). The trial court's adopted findings also indicated that "[m]easured by any standard" Unisys had acted prudently. (App. at 131). Because Executive Life was "licensed" under state law and because the consultant who conducted the first of the three bids had kept Executive Life on his list of bidders until June 1988,[3] the trial court held that a hypothetical

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defendants' proposed findings of fact and conclusions of law nearly verbatim. Joint Appendix at A04819-911, *Unisys II*. Most of the changes were the elimination of footnotes.

[3] Becker testified at trial that the primary criteria for inclusion on his list of bidders was a AAA rating from Standard

prudent fiduciary would have purchased Executive Life. (App. at 127 & n.25, 128). The district court granted judgment for Unisys, and the Plaintiffs appealed.

On appeal, the Plaintiffs asserted that the district court had erred in refusing to qualify Gottheimer because it had relied upon criteria that went to the weight to be accorded to his testimony, rather than its admissibility under Rule 702 of the Federal Rules of Evidence. (App. at 22). The court of appeals held that the district court did not abuse its discretion in excluding Gottheimer's testimony under Rule 702. (App. at 24-25, 27). The court of appeals also held that any error in excluding Gottheimer's opinion would be harmless because the trial court found that it would not have believed him had he testified. (App. at 28). Chief Judge Becker dissented, reasoning that the majority had "made a significant error regarding expert testimony" and that the error was not harmless. (App. at 35) (Becker, C.J., dissenting).

On the merits of the Petitioners' challenge to the prudence of Unisys's investment decisions, the court of appeals made a sequence of rulings relevant here. First, the court of appeals emphasized the district court's statement that " '[m]easured by any standard, the Unisys fiduciaries' actions are consistent with the prudence requirements of ERISA,' " (App. at 17) (quoting App. at

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& Poors. At the time he removed Executive Life, Becker testified that it still had a AAA rating. Joint Appendix at A00565-66, *Unisys II*. The Participants interpreted this testimony as an indication that reliance upon the Standard & Poors rating alone was not prudent. The trial court, however, interpreted the fact that Becker continued to keep Executive Life on his approved list for six months after the last bid as an indication that Unisys had made an objectively prudent investment.

131), and indicated it was "satisfied" that this ruling was "supported by the evidence." (App. at 19). Second, the court held that the evidence supported the district court's ruling that the fact that Executive was licensed, and that Unisys's consultant had only removed it from his list of qualified bidders six months after all the purchases were made were sufficient (along with other factors) to demonstrate that a hypothetical prudent fiduciary would have made the same investments. (App. at 18-19). Third, the court of appeals held that the district court had erred in applying a deferential standard to assess the prudence of the Respondents' investment decisions, but concluded that this error was harmless. (App. at 19-20). Chief Judge Becker concurred in the disposition of the panel on the prudence of the investments: "Although I agree with the majority that, based on the admitted evidence, this conclusion was not clearly erroneous, this is to me an exceedingly close question." (App. at 64) (Becker, C.J., dissenting).

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A CONFLICT AMONG THE COURTS OF APPEALS ON THE STANDARD OF REVIEW GOVERNING MIXED QUESTIONS OF LAW AND FACT.

"The question of the appropriate standard of review for mixed questions of law and fact has long bedeviled appellate courts." *Carpenters Amended & Restated Health Benefit Fund v. Holleman Constr. Co.*, 751 F.2d 763, 767 n.7 (5th Cir. 1985). Mixed questions of law and fact are "questions in which the historical facts are admitted or

established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). What has "bedeviled" the lower courts is whether mixed questions should be treated under the deferential "clearly erroneous" standard prescribed by Rule 52(a) of the Federal Rules of Civil Procedure, or under some more exacting standard. In *Swint*, this Court concluded that the issue before it was one of fact, and noted that "[w]e need not, therefore, address the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact." *Id.* This case presents that problem again: in addressing the question whether the decision to purchase the Executive Life contracts was consistent with ERISA's prudence standard, the court of appeals was reviewing a mixed question of law and fact.

A.

Granting the writ will permit this Court to resolve a long-standing conflict among the courts of appeals on the standards governing review of mixed questions of law and fact. *Compare G.J. Leasing Co. v. Union Electric Co.*, 54 F.3d 379, 382 (7th Cir. 1995) ("a district judge's determinations of mixed questions of fact and law, as of questions purely of fact, can be set aside on appeal only if clearly erroneous.") *with Cooper Tire & Rubber Co. v. St. Paul Fire & Marine Ins. Co.*, 48 F.3d 365, 369 (8th Cir.) (mixed questions reviewed *de novo* if they require "the consideration of legal concepts and the exercise of judgment about the values underlying the legal principles. . . . "), *cert. denied*, 516 U.S. 913 (1995).

The rationale for both deferential and non-deferential standards of review lies in the relative institutional strengths of district courts and courts of appeal. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995). Thus, appellate courts defer to district court determinations of historical fact because district courts have substantial expertise in addressing factual disputes. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 577 (1985). In contrast, courts of appeals are better suited to address legal issues correctly and develop sound precedent. Courts of appeals have the opportunity for collective decision making on the basis of a settled record and a more comprehensive analysis by the parties to a particular dispute. *See Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991).

Application of independent review of legal issues without deference to the determination of the trial court is the duty of courts of appeals. *Id.* at 238 ("When *de novo* review is compelled, no form of appellate deference is acceptable."). In *Salve Regina*, this Court held that addressing the correct approach to review of district court decisions on state law issues was important, even though application of the correct standard might not change the result in a large body of cases. *Id.* at 237-38. The same principle applies with equal force to the standard governing mixed questions, presenting this Court with an important issue of federal law on which there is a long-standing conflict among the circuits. The various approaches followed by the courts of appeals fall into three categories.

The Seventh Circuit applies the clearly erroneous standard to mixed questions. *See Mucha v. King*, 792 F.2d

602, 605-06 (7th Cir. 1986); *see also United States v. Frederick*, 1999 U.S. App. LEXIS 7420 at *2 (7th Cir. Apr. 15, 1999) ("The presumption in this circuit is and we hope will remain that the clear-error standard is the proper standard for appellate review of mixed questions of law and fact."). The First Circuit also historically applied the clearly erroneous standard. *See Sweeney v. Board of Trustees*, 604 F.2d 106, 109 n.2 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980).

The Second Circuit, in contrast, normally applies *de novo* review to mixed questions. *See Scribner v. Summers*, 84 F.3d 554, 557 (2d Cir. 1996). The Eighth and D.C. Circuits also apply *de novo* review. *See Besta v. Beneficial Loan Co.*, 855 F.2d 532, 533 (8th Cir. 1988); *Carter v. Bennett*, 840 F.2d 63, 65 (D.C. Cir. 1988). In addressing mixed questions, the Third Circuit normally applies plenary review to the application of law to fact, *Feder v. Evans-Feder*, 63 F.3d 217, 222 n.9 (3d Cir. 1995), as does the Fifth Circuit. *Reich v. Lancaster*, 55 F.3d 1034, 1044-45 (5th Cir. 1995).

The Ninth and Tenth Circuits apply a sliding scale approach. *See United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.) (*en banc*), *cert. denied*, 469 U.S. 824 (1984); *see also Supre v. Ricketts*, 792 F.2d 958, 961-62 (10th Cir. 1986). This approach calls for the court to determine where the question presented falls on the law-fact continuum and to select the appropriate standard based upon that analysis. *McConney*, 728 F.2d at 1202. The First Circuit has applied this approach in more recent decisions. *See In re Howard*, 996 F.2d 1320, 1328 (1st Cir. 1993); *see also United States v. Bergodere*, 40 F.3d 512, 516 (1st Cir. 1994).

Under current law, the standards for appellate review of the decisions of district judges applying law to a particular fact pattern vary widely. By granting the writ, this Court will have the opportunity to assure that uniform standards govern the operation of the courts of appeals.

B.

Even if this Court is not prepared to define the standard of review for all mixed questions conclusively, granting the writ will permit Court to resolve the conflicting approaches to review of mixed questions that arise in ERISA cases. As this Court has previously explained, in enacting ERISA, Congress sought to have the federal judiciary "develop a 'federal common law of rights and obligations under ERISA-regulated plans.' " *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 46, 56 (1987)). Congress sought to create a federal common law because it perceived a need for uniformity:

> it is evident that the operations of employee benefit plans are increasingly interstate. The uniformity of decisions which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.

H.R. Rep. No. 533, 93d Cong. 2d Sess. (1974), *reprinted in*, 1974 U.S. Code, Cong. & Admin. News 4639, 4650. Instead, because of the differing standards applied by the courts of appeals to mixed questions, plan sponsors, participants and fiduciaries face a circumstance in which such basic questions as whether a plan exists, whether a person is a fiduciary, or whether a fiduciary has breached

his duties can be resolved differently in different courts on similar facts. This is precisely what Congress sought to avoid.

Courts have generally treated the application of ERISA's substantive standards to the facts of a particular case as a mixed question of law and fact. While this characterization is undoubtedly correct, as it comports with this Court's definition of a mixed question in *Swint*, it unfortunately carries with it the conflicting standards of review which the various circuits have developed to address mixed questions. *See Laborers National Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 316, 322 (5th Cir. 1999) (district court's interpretation of law and application of law to fact are reviewed *de novo*; reversing determination that investments were imprudent after "a proper application of the correct legal principles to the evidence"); *Meditrust Financial Services Corp. v. Sterling Chemicals, Inc. Medical Benefit Plan*, 168 F.2d 211, 214 (5th Cir. 1999) (question whether a plan administrator abused its discretion in determining medical necessity of treatment is a mixed question to be reviewed *de novo*); *Deegan v. Continental Casualty Co.*, 167 F.3d 502, 506 (9th Cir. 1999) (question whether participant was totally disabled a mixed question subject to clearly erroneous review); *New England Mut. Life Ins. Co. v. Baig*, 166 F.3d 1, 3 (1st Cir. 1999) (existence of an ERISA plan is a mixed question; trial court's interpretation of the term "plan" receives plenary review); *Lopresti v. Terwilliger*, 126 F.3d 34, 39 (2d Cir. 1997) (district court's determination that an individual is a fiduciary reviewed *de novo* where issue on appeal is the application of the definition to the facts); *Hockett v. Sun Company, Inc.*, 109 F.3d 1515, 1524 n.3 (10th Cir. 1997) (question whether changes to benefit plan were

under "serious consideration," triggering disclosure duties is a mixed question; district court's determination reversed based upon appellate court's application of the appropriate legal standard to the facts found by the district court); *Eyler v. Commissioner*, 88 F.3d 445, 448 (7th Cir. 1996) (in action involving question of ESOP trustees' good faith and prudence in valuing employer securities, trial court's application of legal principles to facts reviewed for clear error); *Central States Southeast and Southwest Pension Fund v. Central Transport, Inc.*, 85 F.3d 1282, 1288-89 (7th Cir. 1996) (in assessing claim that corporate entity was alter ego of employer and thus responsible for contributions to multi-employer plan, court of appeals found sufficient evidence in record to support district court's findings and saw no need to disturb them under clearly erroneous standard);[4] *Kuper v. Iovenko*, 66 F.3d 1447, 1453 (6th Cir. 1995) (in context of action alleging ESOP trustees breached their fiduciary duties by failing to diversify, review of mixed questions of law and fact is *de novo*); *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 537 (9th Cir. 1990) (determination whether plan fiduciary acted in an arbitrary and capricious manner in denying benefits is a mixed question that was fact-governed and subject to clearly erroneous standard). The different approaches that the courts of appeals have developed in reviewing mixed questions thus threaten

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[4] One older Seventh Circuit case involving a challenge to fiduciary investment decisions indicates that a less deferential standard than clear error applies to mixed questions. *See Leigh v. Engle*, 727 F.2d 113, 124 (7th Cir. 1984). *Leigh* is probably no longer good law in view of the Seventh Circuit's decision in *Mucha v. King*, holding that mixed questions should be governed by the clearly erroneous standard. 792 F.2d at 605-06.

the uniformity that Congress sought to establish under ERISA.

The need for uniformity and the congressional intent that the federal judiciary create a federal common law governing employee benefit plans both are strong indications that the standard governing review of mixed questions in ERISA cases should be *de novo*. *See Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991). In *Litton*, this Court was reviewing an NLRB decision refusing to order arbitration that was based upon the board's interpretation of a collective bargaining agreement and related federal common law. The Court declined to defer to the NLRB, reasoning as follows:

> Section 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. § 185, 'authorizes *federal courts* to fashion a body of federal law for the enforcement of . . . collective bargaining agreements.' *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448, 451, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957) (emphasis added). ***We would risk the development of conflicting principles were we to defer to the Board in its interpretation of the contract, as distinct from its devising a remedy for the unfair labor practice that follows from a breach of contract. We cannot accord deference in contract interpretation here only to revert to our independent interpretation of collective-bargaining agreements in a case arising under § 301.***

501 U.S. at 202-03 (emphasis supplied). *Cf. Ornelas v. United States*, 517 U.S. 690, 697-98 (1996) (need for uniformity and appellate control over development of precedent support application of *de novo* review to determination of probable cause for warrantless searches and reasonable suspicion for investigatory stops).

Here, in contrast, the court of appeals simply reviewed the district court's determination of prudence deferentially, holding that it was "supported by the evidence." (App. at 19). This is an application of the clearly erroneous standard. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 119 (1969) (court of appeals erred in reversing district court finding under clearly erroneous standard where "the record evidence is sufficient to support a finding of damage . . . "); (App. at 64) (Becker, C.J., dissenting) ("Although I agree with the majority that, based on the admitted evidence, this conclusion was not clearly erroneous, this is to me an exceedingly close question."). *See generally* 1 Steven A. Childress & Martha S. Davis, *Federal Standards of Review*, at 2-128 (2d Ed. 1992 & Supp. 1998) ("*sufficency* is the whole point of review for clear error. . . . ") (emphasis supplied).

In *Salve Regina*, this Court examined the review applied by courts of appeals to district court decisions interpreting state law. In assessing a holding that a district court's interpretation was not deficient in analysis and was reasonable, this Court concluded that "[t]his neither purports to be, nor is, a conclusion following from *de novo* review." 499 U.S. at 236. The Third Circuit's holding that the evidence supports the district court's prudence determination similarly amounts to nothing more than deference. In addressing the prudence of the investment decision, the Third Circuit simply quoted the district court's findings concerning the evidence. The court of appeals never addressed case law and regulations indicating that reliance upon ratings would be insufficient. *Pilkington PLC v. Perelman*, 72 F.3d 1396, 1401 (9th Cir. 1995); *see also* 29 C.F.R. § 2509.95-1(c) (reliance

upon ratings alone insufficient). Similarly, the Third Circuit upheld the trial court's determination that the fact Executive Life was "licensed" demonstrated that the investment was prudent without discussing the Labor Department's long-standing position that the requirement that an insurer be licensed was merely a minimum. *See Labor Department Letter on Fiduciary Responsibility and Plan Terminations*, 13 Pens. Rptr. (BNA) 472 (Dep't Labor 1986) ("the fiduciary provisions of ERISA, including the prudence requirement of section 404(a)(1)(B), will apply to the choice of insurer to issue annuities upon plan termination.").[5]

The deferential approach of the court of appeals is particularly troubling here: the trial court's legal analysis centered upon its view that it was obligated to apply deferential review to the investment decisions of Unisys. (App. at 125-31). The court of appeals held that this view was in error, but nonetheless deferred to the by-product of that error, relying upon a single line contained in the

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[5] Respondents may assert that the court of appeals actually applied *de novo* review to the prudence questions presented here. While at the commencement of its opinion the court indicates that "[a]pplication of legal precepts to historical facts receives plenary review," (App. at 8), its actual analysis of the prudence questions is not consistent with that statement. Moreover, this Court is plainly not bound by the lower court's description of the standard that it applied. In *Anderson v. City of Bessemer City*, the court of appeals actually indicated that it was applying the clearly erroneous standard but did so more stringently. 470 U.S. at 576 ("In detecting clear error . . . , the Fourth Circuit improperly conducted a *de novo* weighing of the evidence. . . . "). Similarly, in *First Options of Chicago, Inc. v. Kaplan*, this Court looked past the *de novo* label applied by the Third Circuit to identify the actual standard that it applied. 514 U.S. at 947-48.

district court's findings of fact and conclusions of law that Unisys was prudent under "any standard." (App. at 17). Where a trial court bases findings on a mistaken impression of the law, the reviewing court should not defer to them. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982); *see also Miller v. Fenton*, 474 U.S. 104, 118 (1985) (remanding for re-examination under *de novo* standard despite statement by Third Circuit that it would have reached the same result if it had applied *de novo* review, rather than clearly erroneous standard).

Equally troubling is the deference accorded to the conclusions of law that the district court borrowed wholesale from the proposed findings of fact and conclusions of law presented by Unisys. While the fact that the district court engaged in verbatim adoption of proposed findings of fact does not change the standard of review governing its fact findings under *Anderson v. City of Bessemer City*, it should have caused the court of appeals to engage in a searching analysis of the district court's legal conclusions. Instead, this case presents the spectacle of a federal common law standard for fiduciary conduct emanating from the advocacy of defense counsel, rather than the independent judiciary to whom Congress committed it.[6]

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[6] This Court has specifically criticized the practice of adopting a party's proposed findings verbatim, "particularly when those findings have taken the form of conclusory statements unsupported by the record." *Anderson v. City of Bessemer City*, 470 U.S. at 572. This case involves far more extensive copying than *Anderson*. The trial judge in *Anderson* did not improperly adopt a party's proposed findings verbatim. Rather, "the court itself provided the framework for the

C.

The Court should also grant the writ because the issue presented is important. The selection and application of the correct standard of review in this case has broad implications for the central role in evaluating fiduciary conduct that Congress sought to establish for the federal judiciary:

> a fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state. It is expected that courts will interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by the Act.

H.R. Rep. No. 533, 93d Cong. 2d Sess. (1974), *reprinted in*, 1974 U.S. Code, Cong. & Admin. News 4639, 4650. This goal of uniformity supports the notion that the question whether a fiduciary has acted prudently based upon the historical facts of a case should be reviewed *de novo*.

In *Ornelas v. United States*, this Court held that the determination whether there was reasonable suspicion to support an investigatory stop and whether there was probable cause to conduct a warrantless search of a car were mixed questions of law and fact that should be

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proposed findings when it issued its preliminary memorandum, which set forth its essential findings and directed petitioner's counsel to submit a more detailed set of findings consistent with them." 470 U.S. at 572. Here, in contrast, the trial court did precisely what *Anderson* criticized. The trial judge simply adopted all of his findings of fact and conclusions of law word-by-word from defense counsel's proposal with only cosmetic changes, copying them from a computer diskette.

reviewed *de novo*. 517 U.S. at 697-98. The Court cited several reasons. First, it noted that application of a deferential standard of review could lead to varying results in cases that had virtually identical facts. "Such varied results would be inconsistent with the idea of a unitary system of law." *Id.* at 697. Second, the Court noted that the application of independent review was necessary to development of legal doctrine: "[T]he legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.*; *see also Miller v. Fenton*, 474 U.S. at 114. Third, the Court noted that *de novo* review would help create a uniform body of precedent providing needed guidance: "[*D*]*e novo* review tends to unify precedent and will come closer to providing law enforcement officers with [definitive guidance]." 517 U.S. at 697. While there are obviously differences between the constitutional standards at issue in *Ornelas* and the statutory duties at issue here, there are similarities because the operative standard is rooted in an objective standard of prudence:

> Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. . . . We have described reasonable suspicion simply as "a particularized and objective basis" for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable ***prudence*** in the belief that contraband or evidence of a crime will be found.

517 U.S. at 695-96 (emphasis supplied).

Given the directive from Congress that the federal courts create federal common law under ERISA, and the need for uniformity that led Congress to create a federal standard for fiduciary conduct, the same institutional concerns that support *de novo* review of the fact sensitive questions of probable cause and reasonable suspicion indicate that courts of appeal should independently evaluate the application of ERISA's prudence standard to the facts of particular cases, rather than simply giving presumptive force to the trial court's analysis.

II.

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT ADDRESSING THE ROLE OF TRIAL JUDGES IN DETERMINING THE ADMISSIBILITY OF EXPERT TESTIMONY.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court described the two central considerations governing the admissibility of scientific testimony under Rule 702 of the Federal Rules of Evidence: whether the expert's methodology was valid, and whether the expert's methodology can properly be applied to the facts of the particular case. 509 U.S. at 592-93. The Court stressed that trial judges assessing these *Daubert* factors of reliability and fit should employ a specific analytical framework: "The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595.

In *Kumho Tire Company Ltd. v. Carmichael*, ___ U.S.___, 119 S. Ct. 1167 (1999), this Court held that the basic *Daubert* factors of reliability and fit apply to non-scientific

testimony as well. 119 S. Ct. at 1175. This Court also held that the trial court enjoyed discretion to apply certain of the specific reliability criteria discussed in *Daubert* to assess the reliability of proffered expert testimony. 119 S. Ct. at 1175-76. The Court in *Kumho* reiterated that the ultimate task of the trial judge was to determine "whether the testimony has a 'reliable basis in the knowledge and experience of [the relevant] discipline.' " *Id.* at 1175 (quoting *Daubert*, 509 U.S. at 592) (alteration in the original).

The Third Circuit's treatment of the Rule 702 admissibility requirements of reliability and fit conflicts with this Court's decisions in *Daubert* and *Kumho*. The application of Rule 702 by the court of appeals, in conjunction with its harmless error analysis, effectively eliminates the applicability of *Daubert* and *Kumho* in non-jury trials by permitting district judges to exclude expert testimony following *voir dire* on the basis of factors that normally go to the weight to be accorded to the testimony, not its admissibility. Moreover, its treatment of qualifications and of the exclusion of experts on the basis of credibility conflicts with decisions of other circuits.

A.

A major premise of the Third Circuit's holding is its determination that an expert's personal credibility is relevant to assessing the reliability of his proffered testimony. (App. at 22-23). This conflicts with this Court's express directive in *Daubert* that trial judges focus "***solely on principles and methodology***, not on the conclusions that they generate." 509 U.S. at 595 (emphasis supplied). The conflict was readily apparent to Chief Judge Becker:

> [t]he majority misconceives the fundamental nature of the reliability inquiry under *Daubert*. The reliability inquiry focuses not on the witness's reliability in an evidentiary sense, but on the reliability of the methodology that the expert applies in arriving at an opinion.

(App. at 45-46) (Becker, C.J., dissenting).

Faced with Chief Judge Becker's criticism of this premise, the panel majority responded that his dissent erroneously relied upon *Daubert*, which the majority held applied only to scientific expert testimony. (App. at 26). The majority stated that this distinction is "controlling." (App. at 26). The next day, this Court specifically held in *Kumho* that *Daubert* applies to non-scientific expert testimony. 119 S. Ct. at 1175. After the *Kumho* decision was brought to its attention, the Third Circuit's effort to bolster its reliability analysis only served to undercut the guidance that this Court provided in *Daubert* and *Kumho*. Reasoning that trial courts enjoy discretion in determining the factors employed to assess the reliability of expert testimony and that appellate review is for abuse of discretion, the Third Circuit held that *Kumho* actually strengthened its holding that the personal credibility of an expert can be considered in assessing the reliability requirement under *Daubert*. (App. at 152 & n.1).

This approach leaves district courts without clear guidance and abdicates the appropriate appellate function of courts of appeals: a district court's exercise of discretion has to be measured by some standard, and the failure of a district court to follow the Rules of Evidence is precisely the type of abuse of discretion that courts of appeals exist to correct. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399-405 (1990). *See also Schlup v. Delo*, 513 U.S. 298, 333 (1995) (O'Connor, J., concurring) ("It is a

paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law.").

B.

The Third Circuit's analysis of the fit requirement also conflicts with *Daubert*. In *Daubert*, this Court held that Rule 702 requires an assessment of whether an expert's proposed testimony is relevant to the issues to be tried. 509 U.S. at 591; *accord United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985). Citing *Downing* with approval, the *Daubert* Court noted that this relevance requirement "has been aptly described by Judge Becker as one of 'fit.' " 509 U.S. at 591.

Fit should never have been in issue here, since the court of appeals had held in *Unisys I* that Gottheimer's report describing his opinions was sufficient to sustain a finding in favor of the Participants. 74 F.3d at 437. The Third Circuit, however, determined that Gottheimer's testimony didn't "fit" the case, not because his testimony was not relevant to the issues to be tried, but because his sub-specialization within the field of insurance was not the type that the district court would have liked. (App. at 25) ("[D]r. Gottheimer's alleged expertise . . . did not fit with or meet the need of the District Court for expert testimony in life insurance investing.") (*citing Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1055-56 (3d Cir. 1997)).[7] Thus, the majority opinion conflicts with *Daubert*, which

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[7] As Chief Judge Becker noted, the majority's reliance on *Surace* is misplaced, as the case did not involve the fit between an expert's testimony and the issues in the case but rather an inquiry into the expert's qualifications. (App. at 54 n.12) (Becker, C.J., dissenting).

held that "fit" is a question of relevance, not of the expert's qualifications.

C.

This Court should grant the writ in order to maintain the integrity of its decisions in *Daubert* and *Kumho*: lower courts need guidance on how to analyze the admissibility of expert testimony, and the need for clear standards in this area has been recognized by this Court. *See Kumho*, 119 S. Ct. at 1174 ("it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge."). The need for analytical clarity is aptly demonstrated by the Third Circuit's decision here. By conflating considerations that go to the weight to be accorded to an expert's testimony with the Rule 702 standards of reliability and fit, the court of appeals inadvertently called into question two long-standing principles governing its treatment of expert testimony: that a trial court cannot insist upon a particular degree or background for an expert[8] and that an expert's credibility is not relevant under Rule 702.[9]

The Third Circuit's decision affirming Gottheimer's exclusion on the basis that his qualifications were "less than stellar," (App. at 25), conflicts with the opinions of other courts of appeals holding that the magnitude of an

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[8] *See In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 855 (3d Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); *see also Waldorf v. Shuta*, 142 F.3d 601, 626 (3d Cir. 1998) .

[9] *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 749 (3d Cir. 1994), *cert. denied*, 513 U.S. 1120 (1995).

expert's qualifications goes to weight, not to admissibility. *See Huval v. Offshore Pipelines, Inc.*, 86 F.3d 454, 457-58 (5th Cir. 1996) (district court did not err in admitting testimony of witness having "broad, general experience in the insurance industry" over objection that witness had no experience acting as an agent where an insurance consultant was involved and no experience working directly with a London broker); *see also United States v. Garcia*, 7 F.3d 885, 889-90 (9th Cir. 1993); *Garnac Grain Co., Inc. v. Blackley*, 932 F.2d 1563, 1567 (7th Cir. 1991); *Quinton v. Farmland Indus., Inc.*, 928 F.2d 335, 337 (10th Cir. 1991); *Exum v. General Elec. Co.*, 819 F.2d 1158, 1163-64 (D.C. Cir. 1987); *Payton v. Abbott Labs*, 780 F.2d 147, 155 (1st Cir. 1985); *United States v. Hensel*, 711 F.2d 1000, 1006 (11th Cir. 1983); *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1241 (7th Cir. 1982). The Third Circuit's holding that the district court properly considered Gottheimer's personal credibility in assessing the admissibility of his testimony conflicts with the Fifth Circuit's contrary holding in *Dixon v. International Harvester Co.*, 754 F.2d 573, 580 (5th Cir. 1985).

These errors on the part of the court of appeals were apparently driven by the central premise of its harmless error analysis: in non-jury trials the district court's role as fact-finder alters the nature of its gatekeeper role under *Daubert*. The court of appeals held that because the district judge was both gatekeeper under Rule 702 and fact finder, he should not be required to "waste judicial time" listening to testimony from an expert the judge has already concluded he would refuse to believe, and that the judge must be given "great deference" by the court of appeals. (App. at 27-28). But just because the district judge in a non-jury trial performs both the gatekeeping

and fact-finding functions, it does not follow that these two distinct functions can be collapsed into a single function to enable the judge to make hasty determinations about the weight of the evidence. Because the Third Circuit's melding of the gatekeeping and fact-finding roles raises significant institutional concerns, we address it separately below.

D.

This Court should grant the writ because the Third Circuit's holding that immediately after hearing their *voir dire* examination trial judges in non-jury trials can exclude experts on the basis of credibility issues raises important issues concerning the integrity of the judicial process in non-jury trials. Arriving summarily at a premature judgment on an expert's credibility that would prevent the district judge from crediting the expert's testimony if he were permitted to testify displays a lack of the appearance of impartiality that is vital to assuring that federal trials are fair and that litigants are afforded due process.

First, the Third Circuit's ruling permits trial judges to pre-judge evidence in a way that may effectively deny a party its day in court. The Tenth Circuit has recognized that judging the weight of the evidence prematurely can result in a denial of due process. At the commencement of the trademark infringement trial in *Frito-Lay, Inc. v. Morton Foods, Inc.*, 316 F.2d 298 (10th Cir. 1963), the trial judge inquired into the evidence to be offered, and concluded that expert testimony on the possibility of confusion coupled with the testimony of consumers who had actually been confused by the infringing product would not persuade him to rule for the plaintiff. The trial court

thus entered judgment for the defendant. *Id.* at 299-301. The Court of Appeals reversed, holding that the trial judge had improperly denied the plaintiff its day in court. *Id.* at 300. In *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957), this Court expressed similar concerns about a trial court's decision to refer virtually all issues in a case to a special master. Federal district judges routinely instruct juries to keep an open mind about the facts of cases until they have heard all of the evidence. *See* 1 Hon. Edward J. Devitt & Charles B. Blackmar, *Federal Jury Practice and Instructions*, § 10.14 at 273 (3d ed. 1977) ("you should keep an open mind throughout the trial, reaching your conclusion only during your final deliberations after all the evidence is in. . . . "). By permitting trial judges to collapse their fact-finding role into their gatekeeping role, the Third Circuit is permitting district courts to pre-judge evidence in a way that will impair the confidence of litigants in the fairness of non-jury trials.

Second, the Third Circuit's holding that a trial court can refuse to hear a witness on the basis of credibility undermines the integrity of the fact-finding process in non-jury trials. District judges file findings of fact not only to aid appellate review and to promote public confidence in the judicial system, but because the preparation of findings assists the trial court in addressing the evidence: "[o]ften a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper." *United States v. Forness*, 125 F.2d 928, 942 (2d Cir.), *cert. denied*, 316 U.S. 694 (1942). The simple fact is that judges do change their minds and set aside preliminary impressions: "During the resolution process the trial judge in a bench trial must be free to reassess the evidence, and to

alter or modify its views before final judgment." *Integrated Circuits Unlimited v. E.F. Johnson Co.*, 875 F.2d 1040, 1043 (2d Cir. 1989). As trial judges change their minds on the merits of cases during the course of adjudication, it is difficult to see how a preliminary judgment of unheard testimony can justify excluding a witness's testimony. Instead, Plaintiffs submit that the trial court should withhold judgment until it has heard the evidence. *See generally*, Hon. Ruggero J. Aldisert, *Opinion Writing*, 156-57 (1990) (in preparing findings, trial court "should consider all the evidence presented"); *see also Commonwealth v. Coleman*, 390 Mass. 797, 802, 461 N.E.2d 157, 160 (1984) ("[A] judge's duty to 'hear all competent evidence requires as a necessary incident of that duty that he shall hear the evidence with an open mind and not reach a final conclusion upon the issue until he has heard all evidence bearing upon it which a party is prepared to offer and has a right to introduce.' ") (quoting *Preston v. Peck*, 271 Mass. 159, 163-64, 171 N.E. 54, 54-55 (1930)).

Third, the Third Circuit's holding that a trial court can refuse to hear a witness on the basis of credibility and that such a credibility determination is entitled to substantial deference also threatens the ability of courts of appeals to review non-jury trials. In *Anderson v. City of Bessemer City*, this Court held that deference to credibility determinations has limits:

> This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story or the story may be so internally inconsistent or implausible on its face that

> a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may find clear error even in a finding purportedly based on a credibility determination.

470 U.S. at 575 (citations omitted). Here, Gottheimer was not permitted to tell the story that would have enabled the district judge to assess the credibility of the evidence he offered based upon its relationship to the other evidence in the case. By permitting a district judge to make credibility determinations following *voir dire* and exclude an expert's testimony on that basis, the Third Circuit has created a circumstance in which a credibility finding cannot be reviewed because the trial court did not permit a record to be made that would permit review.

The issues that the Third Circuit's holding on the application of Rule 702 in non-jury trials raises are important because the decision affects the entire category of federal non-jury trials. According to the Administrative Office of United States Courts, non-jury trials annually have averaged thirty-seven percent of all federal trials since 1994. *Judicial Business of the United States Courts*, Table T-1 (1994-98). Non-jury trials during this period have averaged more than 2,500 annually. *Id.* These cases involve significant federal concerns, including most admiralty cases, antitrust injunction cases, most bankruptcy matters, CERCLA actions, claims under the Federal Tort Claims Act, habeas corpus proceedings, ERISA cases, and certain actions under the federal securities laws, including SEC disgorgement actions and civil injunction actions. *See generally*, 8 James Wm. Moore, et al., *Moore's Federal Practice* ¶¶ 38.32, 38.33 (3d ed. 1999). Consequently, the problems posed by the Third Circuit's holding on the admissibility of expert testimony in non-

jury cases will have a significant impact on judicial administration.

CONCLUSION

For the reasons stated, certiorari should be granted.

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612-339-6900

IN RE: UNISYS SAVINGS PLAN LITIGATION; JOHN P. MEINHARDT, on behalf of himself and all others similarly situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-03067); BERNARD MCDEVITT, on behalf of himself and all others similarly situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-03126); PARKER C. KEAN, on behalf of himself and all others similarly situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-03164); MICHAEL HECK; JOSEPH MCCARTHY; ANGELO DEPIETRO, on behalf of themselves and all others similarly situated v. UNISYS CORPORATION; THE ADMINISTRATIVE COMMITTEE OF THE UNISYS SAVINGS PLAN; THE INVESTMENT COMMITTEE OF THE UNISYS SAVINGS PLAN; JACK A. BLAINE; JOHN J. LOUGHLIN; KENNETH MILLER; DAVID A. WHITE; STEFAN RIESENFELD (E.D. PA. Civil No. 91-cv-03276); GARY VALA, individually and on behalf of all others similarly situated v. JACK A. BLAINE; MICHAEL R. LOSEY; JOHN J. LOUGHLIN; KENNETH L. MILLER; STEFAN C. RIESENFELD; CURTIS A. HESSLER; DAVID A WHITE; UNISYS CORPORATION; THE NORTHERN TRUST COMPANY (E.D. PA. Civil No. 91-cv-03278); CAROLYN A. GOHLIKE, on behalf of herself and all others similarly situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-03321); NADIA F. SOS; FAROUK M. SOS, individually and on behalf of all others similarly situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-03582); KENNETH GOERS; JOHN J. CIESLICKI, on behalf of themselves and all others similarly situated v. UNISYS CORPORATION; THE NORTHERN TRUST COMPANY (E.D. PA. Civil No. 91-cv-04678); DENNIS C. STANGA; JAMES M. COLLINS, on behalf of themselves and all others similarly situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-04689); JOHN H. BURGESS, JR., on behalf of himself and all others similarly

situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-04696); WILLIAM TORKILDSON v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-04754); John M. Meinhardt, Michael Heck, Joseph McCarthy, Angelo DiPietro, Gary Vala, Carolyn Gohlike, Dennis C. Stanga, James M. Collins, John H. Burgess, Jr., Bernard McDevitt, Parker Kean, Nadia F. Sos, Farouk M. Sos, Kenneth Goers, John J. Cieslicki, and William Torkildson, plaintiffs in the above-listed actions, individually and on behalf of the class certified by Order of the district court entered on January 28, 1992 in Master File Civil Action No. 91-3067, Appellants; IN RE: UNISYS SAVINGS PLAN LITIGATION; JOHN P. MEINHARDT, on behalf of himself and all others similarly situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-03067); HENRY ZYLLA; RICHARD SILVER; RONALD GRIPPO; EDWARD LAWLER; RICHARD ANDUJAR; CLARENCE MULLER; CHARLES WAHLER; JAMES MCLAUGHLIN; DONALD RADER; JOSEPH LAU; JAMES GANGALE; ALFRED CONTARINO; JOHN MARCUCCI; JOSEPH A. FIORE; RICHARD MASTRODOMENICO; NICK KLEMENZ; PETER SZCZYBEK, on behalf of themselves and all others similarly situated; ENGINEERS UNION LOCAL 444 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 445 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 450 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 470 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 165 OF

THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A.F.L.-C.I.O. v. UNISYS CORPORATION; EDWIN P. GILBERT; JOHN J. LOUGHLIN; THOMAS PENHALE, individually and in their capacities as members of the Unisys Employee Benefits Executive Committee and administrators of the Unisys Retirement Investment Plan; RICHARD H. BIERLY, EDWIN P. GILBERT; CURTIS A. HESSLER; LEON J. LEVEL; KENNETH L. MILLER; DAVID A. WHITE; JACK A. BLAINE; STEFAN C. RIESENFELD; GEORGE T. ROBSON, individually and in their capacities as members of the Investment Committee of the Unisys Retirement Investment Plan (E.D. PA. Civil No. 91-cv-03772); Henry Zylla, Richard Silver, Ronald Grippo, Edward Lawler, Richard Andujar, Clarence Muller, Charles Wahler, James McLaughlin, Donald Rader, Joseph Lau, James Gangale, Alfred Contarino, Richard Colby, John Marcucci, Joseph Fiore, Richard Mastrodomenico, Nick Klemenz and Peter Szczybek, plaintiffs in the above-listed actions, individually and on behalf of the class certified by Order of the district court entered on January 28, 1992 in Master File Civil Action No. 91-3067, Appellants

No. 98-1007, No. 98-1037

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

173 F.3d 145; 1999 U.S. App. LEXIS 4863

September 25, 1998, Argued

March 22, 1999, Filed

SUBSEQUENT HISTORY: As Modified April 9, 1999.

Rehearing Denied April 30, 1999, Reported at: 1999 U.S. App. LEXIS 8288.

PRIOR HISTORY: On Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. No. 91-cv-03067). District Judge: Honorable Herbert J. Hutton.

DISPOSITION: Affirmed.

COUNSEL: James R. Malone, Jr. (Argued), Michael E. Gottsch, Pamela Nicolaysen, Chimicles, Jacobsen & Tikellis, Haverford, PA. Joel C. Meredith, Daniel B. Allanoff, Meredith Cohen Greenfogel & Skirnick, P.C., Philadelphia, PA, Attorneys for Appellants.

Laurence Z. Shiekman (Argued), Brian T. Ortelere, Pepper Hamilton LLP, Philadelphia, PA. John Teklits, Unisys Corporation, Blue Bell, PA, Attorneys for Appellees.

Marvin Krislov, Deputy Solicitor for National Operations, Marc I. Machiz, Associate Solicitor, Karen L. Handorf, Counsel for Special Litigation, Paul C. Adair, Trial Attorney, U.S. Department of Labor, Office of the Solicitor, Plan Benefits Security Division, Washington, D.C., Attorneys for Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants.

JUDGES: BEFORE: BECKER, Chief Judge, WEIS and GARTH, Circuit Judges. BECKER, Chief Judge, dissenting.

OPINION BY: GARTH

OPINION: OPINION OF THE COURT

GARTH, Circuit Judge:

This action, brought by employees who had participated in individual account pension plans maintained by their employer Unisys Corporation ("Unisys"), charged essentially that Unisys and the individual defendants[1] had breached their fiduciary duties prescribed by ERISA[2] by investing in Executive Life Insurance Guaranteed Investment Contracts ("GICs"). After a bench trial, the District Court granted judgment for all defendants, ruling in their favor on all issues related to the breach of fiduciary duty claims, thus denying all relief and damages to the plaintiff class of Unisys employees.[3]

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[1] Unisys is one of eleven defendants. Other defendants are the Administrative Committee and the Investment Committee of the Plan and those individuals involved in making decisions for the Plan. The defendants will be referred to collectively as "Unisys."

[2] Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq.

[3] Plaintiffs are a class of Unisys employees who will be referred to throughout this Opinion as "Meinhardt." John P. Meinhardt had originally brought this action as a class action on behalf of himself and all others similarly situated. See *In re Unisys Savings Plan Litig.*, 74 F.3d 420 (3d Cir.), cert. denied, 117 S. Ct. 56 (1996) ("Unisys I").

This is an appeal of two consolidated cases. In the first action, final judgment was entered on November 24, 1997 in eleven related actions after a bench trial. A timely notice of appeal was filed on December 18, 1997. We exercise appellate jurisdiction under 28 U.S.C. § 1291, as an appeal from a final judgment.

The second appeal before this court involves the ERISA claims in a twelfth related action, upon which final judgment has not been entered. The District Court certified the ERISA claims in that action under Fed. R. Civ. P. 54(b) on January 9, 1998; a notice of appeal was filed on January 16, 1998. We

We have reviewed the trial record independently and conclude that in all material respects, the District Court's findings of fact were not clearly erroneous, the District Court did not abuse its discretion in excluding Dr. Gottheimer's testimony, and the District Court did not err in making its conclusions of law. We also conclude that while we do not agree with some of the holdings of the District Court, those disagreements have no effect on the District Court's overall holding of prudence, and that therefore, the orders entered by the District Court on November 24, 1997 and January 9, 1998 will be affirmed.

I.

This is the second appeal from the District Court's rulings in this case. Initially, summary judgment was entered in favor of Unisys, but on review, we remanded for trial. *In re Unisys Savings Plan Litig.*, 74 F.3d 420 (3d Cir.), cert. denied, 117 S. Ct. 56 (1996) ("*Unisys I*"). Almost all of the background facts and details are found in our earlier opinion and we refer here only to those matters particularly relevant to the arguments made by the parties on appeal.

Now that the District Court has rendered its findings of fact and conclusions of law in favor of the Unisys,[4]

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exercise appellate jurisdiction for the second appeal under Fed. R. Civ. P. 54(b) in tandem with 28 U.S.C. § 1291.

[4] The District Court's findings of fact and conclusions of law can be found at *In re Unisys Savings Plan Litig.*, 1997 U.S. Dist. LEXIS 19198, No. 91-3067, 1997 WL 732473 (E.D. Pa. Nov. 24, 1997). For the sake of convenience, we will refer to the District Court's findings of fact as "FF P ___," and to its conclusions of law as "CL P ___."

Meinhardt complains that the standard used by the District Court was improper, that Meinhardt's expert's testimony was improperly excluded, and that Meinhardt suffered damages that were not recognized by the District Court. As indicated above, we hold that the District Court's essential factual findings were not clearly erroneous and that measured by the appropriate prudence standard of ERISA, the District Court properly concluded that Unisys did not breach any fiduciary duty. This threshold holding makes it unnecessary for us to discuss in detail the subsidiary issues raised on appeal by Meinhardt.

At the outset we call attention to the fact that the contours of the factual record have changed significantly since we last addressed the GIC issue presented in this case. At the earlier summary judgment stage, the prior panel of this court was obliged to assume that various facts presented by Meinhardt were true and that all inferences had to be drawn in Meinhardt's favor. Moreover, we assumed the report of Dr. Gottheimer, Meinhardt's proposed expert witness, would be admitted into evidence. As we discuss infra, the District Court properly excluded Dr. Gottheimer from testifying under Fed. R. Evid. 702.

As we have mentioned, at the conclusion of a ten-day bench trial, the District Court entered judgment for Unisys and issued extensive findings of fact and conclusions of law. We review the District Court's findings of

facts for clear error. Application of legal precepts to historical facts receives plenary review. *Feder v. Evans-Feder*, 63 F.3d 217, 222 n.9 (3d Cir. 1995). The District Court's decision to qualify an expert is reviewed for abuse of discretion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997); *In re Paoli R.R. Yard Litig.*, 35 F.3d 717, 741-46 (3d Cir. 1994) ("*Paoli II*").

II.

Meinhardt participated in a 401(k) savings plan ("Plan")[5] administered by Unisys. Two companies, Sperry and Burroughs, had merged in 1986 to create Unisys, and thus their retirement plans also merged. See *Unisys I*, 74 F.3d at 425-26. Meinhardt and the class he represents elected to invest their money in two of the funds offered by the Plan, the Fixed Income Fund ("FIF") and the Insurance Contract Fund ("ICF"). Investments in the FIF/ICF were exclusively restricted to Guaranteed Investment Contracts ("GICs").[6] For ease of reference throughout this Opinion we will refer to the FIF/ICF as the "Fund."

Unisys described the Fund as one of the more conservative funds that was intended to return principal with interest.[7] Plan participants could invest as much or as

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[5] The Plan is actually three separate plans that make joint investments. See *Unisys I*, 74 F.3d at 426-27 & 427 n.5.

[6] A GIC is a contract under which the issuer is obligated to repay the principal deposit at a designated future date and to pay interest at a specified rate over the duration of the contract. *Unisys I*, 74 F.3d at 426.

[7] The Plan offered five other investment funds: the Diversified Fund, the Indexed Equity Fund, the Active Equity

little of their money as they desired. In order to prevent interest rate arbitrage by the participants and in order to receive a higher yield from the GICs, Fund assets could not be transferred to the money market fund directly; Fund assets had to be held for at least a year in one of the four equity stock funds. In 1990, Unisys shortened this "equity wash" to a period of six months after receiving approval from Executive Life. App. 1702.

In 1987 and 1988, Unisys purchased three Executive Life GICs as investments for the Fund. The Executive Life GICs themselves were comprised of assets that potentially had high rates of return, some of which were high yield bonds, or "junk bonds." The junk bonds did not fare well in the late 1980's markets. In 1991, California regulators seized Executive Life and temporarily froze all payments from the Executive Life GICs. By 1996, however, the Fund reimbursed the principal to Meinhardt and had paid some interest, but at a lower rate than had been guaranteed. FF P 80.

Meinhardt accuses Unisys of breaching its fiduciary duties of prudence, diversification, and disclosure with respect to the Executive Life contracts that had been purchased for the Fund. ERISA prescribes that fiduciaries must adhere to a standard of prudence. ERISA requires that a fiduciary's duty shall be discharged:

> with the care, skill, prudence, and diligence under the circumstances then prevailing that a

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Fund, the Unisys Common Stock Fund, and the Short Term Investment Fund ("money market fund"). The money market fund invested in United States Treasury Bills, bank obligations, and other short term investments.

> prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise with like character and with like aims;. . . .

29 U.S.C. § 1104(a)(1)(B).

III.

To determine whether Unisys had satisfied the ERISA standard of prudence, the district court found the following facts from the evidence.

Unisys delegated the responsibility of investing for the Fund to David White and Leon Level. White and Level have educational and practical backgrounds in financial matters. FF PP 17-18; App. 643-45, 1136-37. At the direction of White and Level, Unisys purchased three Executive Life GICs as investments for the Fund through bidding processes in June 1987, December 1987 (both for the FIF), and January 1988 (for the ICF). Of the many GICs purchased for the Fund, only three were Executive Life GICs, constituting between 15 and 20 percent of the Fund's assets. FF PP 14-15; App. 4450. Unisys, through White and Level, considered many firms through a process of competitive bidding, and Unisys heard in-person presentations from the insurance companies. FF P 20; App. 523, 1154.

Unisys presented evidence that for the first bid (June 1987), White and Level hired an experienced investment consultant, Murray Becker, who evaluated many different

insurance firms.[8] FF P 20. In evaluating potential insurance companies from which to purchase GICs, Becker obtained information and ratings from Standard and Poor's and A.M. Best, ratings services that evaluate the stability and potential profitability of various types of companies including insurance companies. Both ratings services gave Executive Life their highest rating.[9] Becker and others testified that the ratings services were quite thorough because they analyzed raw data and interviewed investment managers. App. 535. Becker testified that he and other professionals had a high confidence in the thoroughness of the ratings services, which led to their respective ratings. FF P 21; App. 658-62, 702-03, 708-12, 1160-61. As detailed in the District Court's findings of fact, Becker was very familiar with how the ratings services evaluated the GICs. Id.

Prior to the first bid, Unisys reviewed Becker's bid specifications. FF P 20 n.2; App. 1267-68, 3659. White testified that he carefully considered the use of high yield bonds and knew the risks involved. The prevailing view

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[8] Becker had given Sperry advice about GICs through his firm, Johnson & Higgins, before the Unisys merger. See *Unisys I*, 74 F.3d at 427. Becker handled more than 500 such bids in his career. FF P 20; App. 522.

[9] Standard and Poor's gave Executive Life an AAA rating, which was reaffirmed on several occasions to meet questions concerning, inter alia, the inclusion of high yield bonds in Executive Life's portfolio. FF P 23. An "AAA" rating means that an insurer offers "superior financial security on both an absolute and relative basis." The insurer possesses "the highest safety and [has] an overwhelming capacity to meet policyholder obligations." FF P 24; App. 4279. A.M. Best also gave Executive Life its highest rating, A+. FF P 24.

in the investment world at that time was that high yield guaranteed insurance contracts were good risks. FF P 27; App. 1038-39.

In addition to understanding the risks associated with Executive Life GICs, White chose Executive Life GICs for their other unique features. He selected the three Executive Life GICs to balance other Fund investments – the Executive Life GICs had longer maturity dates, App. 656-57, 692, and their portfolios lacked real estate mortgages or derivatives and had a low proportion of commercial real estate investments. App. 1010, 1156-58. Furthermore, Executive Life used the "barbell" approach in making investments for the GICs; that is, the higher risk associated with the high yield bonds was balanced with low risk, lower yield government bills. FF P 25; App. 1156-58.

For the second two bids and upon completion of the merger between Burroughs and Sperry into Unisys, Unisys decided not to utilize Becker's services. White, Level, and three other employees under their direction had sufficient professional experience to select GIC issuers. Moreover, Becker had charged the Plan $ 25,000 per bid. FF P 31; App. 1162-65. White and Level expanded the list of potential bidders for the second and third bids and maximized the market information available to them. FF P 32; App. 1054-55.

In the months between the bids, White and Level "engaged in an ongoing process of reviewing and updating the information on the potential bidders." FF P 33; App. 615-22. They testified that they also kept abreast of

developments in the GIC industry by reading trade publications and journals. FF P 33 n.6; App. 617, 632. They analyzed the portfolio and risk of the insurance carriers, using the Standard and Poor's and A.M. Best ratings as a source of information about both the insurance companies' asset composition and their creditworthiness. FF P 35; App. 1056. They testified that they would not have been able to replicate the analyses done by the ratings services in-house. App. 711. They had available to them SEC forms 10K and 10Q to review prior to making their selection. FF P 35; App. 1065-66, 631. They had also consulted with a firm that Unisys had engaged to advise it on its defined benefit pension plan. That firm advised Unisys on its selection of issuers for the GIC funds. App. 608, 626-27.

In *Unisys I*, 74 F.3d at 436, we directed the District Court to determine whether the ratings could be used reliably by Unisys. As mentioned earlier, Level and White both testified that the ratings services were respected for their competence and thoroughness throughout the investment and finance community. App. 1160-61, 658-623, 702, 708-11. The District Court found that the ratings services provided reliable information. FF P 21. We are satisfied that this finding is not clearly erroneous. See also *Bussian v. RJR Nabisco*, 21 F. Supp. 2d 680, 1998 WL 639320, at *7 (S.D. Tx. 1998) ("Nabisco's use of the consultant and rating agencies [in selecting an Executive Life annuity] does not demonstrate imprudence.").

The District Court also resolved at trial four other issues of fact that we identified in *Unisys I*. First, evidence in the summary judgment record may have indicated that Becker had recommended the purchase of a three-year

GIC, rather than a five-year GIC. *Unisys I*, 74 F.3d at 427. At trial, however, Becker testified that he had not recommended the shorter maturity (three-year) Executive Life GIC. Rather, his discussion with Unisys officers about maturity dates was very general, leading to the conclusion that the investment in five-year GICs was appropriate. FF P 30; App. 555-558.

Second, at the summary judgment stage, the evidence suggested that Becker told White that Executive Life would lose its AAA rating from Standard & Poor if its investments of junk bonds exceeded 35%, and White believed that 40-50% of Executive Life's investments were junk bonds. *Unisys I*, 74 F.3d at 427. At trial, Becker stated that it was not his view that Executive Life would lose their Standard and Poor's AAA rating if high yield bonds comprised more than 35% of Executive Life's portfolio. Rather, he testified that Executive Life thought its AAA rating might be in jeopardy if their high yield bond holdings exceeded 35%. However, Standard and Poor's had access to the actual percentage of high yield bonds in Executive Life's portfolio, and it still issued a AAA rating to Executive Life. Thus, White's reliance on the AAA rating was neither unreasonable nor imprudent. As discussed infra, even if White had an erroneous view of the percentage of high yield bonds in Executive Life's portfolio, a hypothetical prudent fiduciary would have known that Executive Life's high yield bond percentage was within an acceptable range in Executive Life's and Standard and Poor's analyses. FF P 28; App 501.[10]

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[10] As counsel for Unisys pointed out at oral argument, if Executive Life had 40 of its holdings in high yield bonds, and

Third, in *Unisys I*, we stated:

> [A] reasonable factfinder could infer from this evidence that Unisys failed to analyze the bases underlying [Becker's] opinion of Executive Life's financial condition and to determine for itself whether credible data supported [Becker's] recommendation that Unisys consider investing plan assets with the insurer. A reasonable factfinder could also conclude that Unisys passively accepted its consultant's positive appraisal of Executive Life without conducting the independent investigation that ERISA requires.

Unisys I, 74 F.3d at 435-36 (emphasis added). However, after taking evidence at trial, the District Court did not find that Unisys had failed to make its own evaluation of Executive Life's financial condition, nor did it find that Unisys "passively" had accepted Becker's appraisal. On the contrary, the District Court made numerous findings that White and Level were aware of the composition of assets of Executive Life GICs and that they understood the risks associated with each of those assets. FF PP 25-27.

Fourth, in *Unisys I*, we advised the District Court that it should determine the significance, if any, of Executive Life's substantially higher interest rates. We suggested that dramatically higher interest rates might have prompted Unisys to conduct extra investigation into Executive Life's creditworthiness. As stated earlier, at trial, White testified that he carefully had considered the use of high yield bonds and knew the risks involved.

Executive Life GICs constituted 15-20 of the Fund, White invested only 8 of the Fund assets in high yield bonds.

Unisys recognized that higher rates could, over time, yield dramatic differences in income, but that the trustees were "constrained by their standards of risk tolerance." FF P 25; App. 1250. The District Court credited the testimony of the Unisys fiduciaries and was satisfied and concluded that Unisys had made a reasonable and thorough investigation of Executive Life GICs. CL P 3. We will not disturb that holding here.[11]

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[11] Meinhardt contests three other alleged failures of the District Court to follow this Court's mandate or to consider evidence in the record. Each of these objections however, is without merit because Meinhardt did not tender an expert to show how these facts supported the conclusion that Unisys was imprudent.

First, the evidence revealed that Unisys did not have written investment or diversification standards for the Fund, but that it had guidelines for the money market fund. However, Meinhardt did not present evidence that prudence required written fund guidelines and Unisys testified that the unwritten guideline for investment diversity was that no one investment should constitute more than 20 of a fund's portfolio.

Second, some evidence suggested that Unisys spent less than twenty minutes evaluating each bidder on bid day. Meinhardt presented no evidence that more time should have been spent at bid day, and considering this fact in isolation ignores evidence of Unisys's investigation and consideration of each bidder prior to bid day.

Third, Unisys admitted at trial that the FIF bids had late maturity dates, and thus Executive Life GICs would become larger percentages of the FIF as time wore on. App. 1081. Again, Meinhardt did not demonstrate that the percentages were ever beyond the norm. Moreover, the FIF was phasing out in favor of the ICF.

IV.

The District Court's factual findings support its legal conclusions that Unisys was prudent under the standard articulated in ERISA and that a hypothetical prudent investor would have purchased each of the three GICs. As we stated in Unisys I, ERISA requires that a fiduciary shall discharge

> his duties with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise with like character and with like aims;. . . .

Unisys I, 74 F.3d at 434 (quoting 29 U.S.C. § 1104(a)(1)(B)). We also stated that the prudence requirement focuses on "a fiduciary's conduct in arriving at an investment decision, not on its results, and asking whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." Id.

After taking evidence on the issue of Unisys's prudence, the District Court held that the actions taken by the Fund's trustees satisfied the prudence standard: "Based on the evidence at trial I find that the Unisys fiduciaries undertook adequate and reasonable steps before purchasing the three Executive Life contracts." CL P 3. The District Court concluded, "Measured by any standard, the Unisys fiduciaries' actions are consistent with the prudence requirements of ERISA." CL P 13. We hold that the District Court's findings of fact support its conclusions of law that Unisys was prudent in investing

in Executive Life GICs, and thus Meinhardt failed to prove an essential element of his ERISA claim.

As an alternate theory for holding that Unisys was not imprudent, the District Court considered the objective prudence of Unisys investments in Executive Life GICs by applying the "hypothetical prudent investor" test. *Unisys I*, 74 F.3d at 436 (citing *Fink v. National Savings & Trust Co.*, 249 U.S. App. D.C. 33, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part) and *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919 (8th Cir. 1994)).

The District Court held that a hypothetical prudent fiduciary would have invested in Executive Life GICs because (1) Executive Life was qualified under federal regulations as an insurance company authorized to provide annuities to facilitate the termination of benefit pension plans because it was state licensed, 46 Fed. Reg. 9532, 9534 (1981); (2) other judicial decisions endorsed the purchase of Executive Life annuities, e.g., *Riley v. Murdock*, 890 F. Supp. 444, 458-60 (E.D.N.C. 1995);[12] (3) Becker, the adviser Unisys retained for the first bid, included Executive Life on his approved list of GIC bidders until six months after Unisys made its third and final purchase of Executive Life, App. 559; and (4) other well-known pension plans purchased Executive Life GICs. App. 559, 1742. The District Court did not err in concluding that a hypothetical prudent fiduciary would have

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[12] See also *Bussian v. RJR Nabisco*, 21 F. Supp. 2d 680, 1998 WL 639320 (S.D. Tx. 1998) (decided after the District Court issued its findings of fact and conclusions of law).

made the same investments in Executive Life GICs as the investments made by Unisys. FF P 24 n.3; CL PP 8-10.

In sum, we are satisfied that the District Court's holdings that Unisys was prudent, and in the alternative, that a hypothetical prudent fiduciary would have made the same investments, are supported by the evidence.

V.

In addition to holding that the trustees' actions satisfied the standard of prudence required by ERISA, the District Court went on to discuss why the trustees' actions were not arbitrary and capricious. The District Court need not have discussed application of an arbitrary and capricious standard in this case. In light of the District Court's holding of prudence and our affirmance of that holding, the District Court's discussion of an arbitrary and capricious standard cannot affect the judgment in favor of Unisys.

In Unisys I, we stated that fiduciaries of investment plans had to satisfy the "prudent" legal standard specified in ERISA, cited supra. We stated that one of ERISA's underlying purposes was "to enforce strict fiduciary standards." *Unisys I*, 74 F.3d at 434 (citing 29 U.S.C. § 1001 and H.R. Rep. No. 93-533 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4639-43).

In *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984), we held specifically that the duties of loyalty and prudence demanded by ERISA should not be reviewed through an "arbitrary and capricious" lens. We held that the "standards set forth explicitly in ERISA" should be used to evaluate the

trustees' conduct. Id. at 333-34 (finding support in cases from the Second, Fifth, and Eleventh Circuits). *Struble* governs the question of Unisys's duty of prudence under ERISA.

The District Court should have applied only the standard of "prudence under the circumstances" as required by the statute. Only the standard found in ERISA, 29 U.S.C. § 1104(a)(1)(B); *Unisys I*, 74 F.3d at 434, should have been applied to determine whether Unisys's investment methods were prudent.

As authority for an arbitrary and capricious standard, the District Court cited *Varity Corp. v. Howe*, 516 U.S. 489, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996), *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989), and *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), cert. denied, 516 U.S. 1115, 133 L. Ed. 2d 847, 116 S. Ct. 917 (1996). These cases, however, involved situations not relevant to the present claims asserted against Unisys.

In the context of a case challenging a denial of benefits under 29 U.S.C. § 1332(a)(1)(B) – and not challenging the prudence of investment decisions – the Supreme Court held that the "inherently discretionary" nature of fiduciary functions does not necessarily require a deferential standard of review. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989). Under ERISA, the standard of review over a trustee's decision to deny benefits or the interpretation of the plan is de novo as a general rule; only when the plan gives the trustee discretion to deny benefits or construe the terms of the plan should a court employ the arbitrary and capricious standard. As the instant case does

not concern a denial of benefits under 29 U.S.C. § 1332(a)(1)(B) or an interpretation of Unisys's Plan, Firestone's standard is inapplicable. Nor did *Varity Corp. v. Howe*, 516 U.S. 489, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996), involve a claim that a trustee's investments were imprudent – the claim that Meinhardt makes here.

In *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), cert. denied, 516 U.S. 1115 (1996), we did apply a deferent [sic] arbitrary and capricious standard of review to a claim by a plan's participants that the fiduciary was imprudent. We were careful to point out in *Moench*, however, that our holding was limited to the specific type of plan involved in that case, an Employee Stock Ownership Plan ("ESOP"). Here, of course, the Unisys Plan was not an Employee Stock Ownership Plan. Furthermore, Moench specifically held its analysis was in "complete harmony with the prudent man standard of care obligations imposed by 29 U.S.C. § 1104 on fiduciaries, as our holding implicates only the standard of review of the conduct of a fiduciary and not the standards governing that conduct," *Moench*, 62 F.3d at 566 n.3 (emphasis added), as is the case here.

In sum, Unisys's methods of making that decision must be evaluated using the ERISA standard mandated by *Unisys I* and in accordance with *Struble*. The District Court did not err in concluding that Unisys did not breach its duty of prudence.

For these reasons, the District Court's discussion of an arbitrary and capricious standard was superfluous and constitutes no more than harmless error. Fed. R. Civ. P. 61. The District Court's statements that Unisys's actions were not arbitrary and capricious do not negate

its otherwise correct holding that Unisys satisfied the ERISA prudence standard.

VI.

Meinhardt also argues that the District Court abused its discretion when it decided to exclude the testimony of Dr. George M. Gottheimer, one of Meinhardt's two proposed expert witnesses.[13] Meinhardt offered Dr. Gottheimer to testify on the subject of "the customary methods of investigating the financial condition and creditworthiness of insurance companies."

To qualify as an expert under Fed. R. Evid. 702, a witness must have sufficient qualifications in the form of knowledge, skills, and training. Additionally, the court must find that the testimony of the expert will be reliable and that the testimony will "fit," that is, assist the trier of fact. *In re Paoli R.R. Yard Litig.*, 35 F.3d 717, 741-43 (3d Cir. 1994). While it may be arguable that the "fit" prescribed in *In re Paoli* is a "fit" reflecting on the substance of the witness' testimony, we think it just as relevant to the "fit" reflecting on the witness' credibility. Indeed, in the recent Supreme Court decision discussing the standard of review applicable to the admission and exclusion of expert evidence, the Supreme Court refers to the District

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[13] Meinhardt's expert Tsetsekos was qualified to testify and did testify on the issue of damages caused by Unisys's alleged breaches of its duties of diversification and disclosure. However, the District Court held that his testimony was insufficient to prove that any alleged failure to diversify or disclose information caused Meinhardt and the other class plaintiffs to suffer losses. We agree. See infra Parts VII and VIII.

Court's "gatekeeper" role of screening such evidence to ensure that it is not only relevant but reliable. The Court goes on to write, "A court of appeals applying 'abuse of discretion' review to [expert testimony] rulings may not categorically distinguish between rulings allowing expert testimony and rulings which disallow it." *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 517, 139 L. Ed. 2d 508 (1997). Thus in our view, the Court's emphasis on reliability as well as on relevancy embraces within its standard the credibility of the witness proffering expert opinion. This is particularly true where, as here, it is the district court judge sitting as a finder of fact who must rule on issues of evidence. See *Goodman v. Highlands Ins. Co.*, 607 F.2d 665, 668 (5th Cir. 1979) ("[A] trial judge sitting without a jury is entitled to even greater latitude concerning the admission or exclusion of evidence.").

While we could understand issue being taken with the *Goodman* precept, it appears to us after *Joiner* that the *Goodman* standard has been given increased viability. Although *Joiner* was a summary judgment decision, it nevertheless emphasized that *Daubert* did not alter the general rule announced in *Spring Co. v. Edgar*, 99 U.S. 645, 25 L. Ed. 487 (1978). In *Edgar*, the Court stated, " 'cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous.' " *Joiner*, 118 S. Ct. at 517 (quoting *Edgar*, 99 U.S. at 658). After so stating, the Court rejected any alteration of this rule and in the context of expert testimony said, "But *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)] did not address the standard of appellate

review for evidentiary rulings at all. . . . " Id. The Court then repeated that under *Daubert* " 'the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.' " Id. (quoting *Daubert*, 509 U.S. at 589).

The Court went on to hold in Joiner that the Eleventh Circuit had erred in reviewing the exclusion of Joiner's experts' testimony because it failed to give the trial court the deference that is the hallmark of abuse of discretion review. Id. (citing *Koon v. United States*, 518 U.S. 81, 97-99, 135 L. Ed. 2d 392, 116 S. Ct. 2035 (1996)). The Court further held that the studies upon which Joiner's experts relied were not sufficient whether individually or in combination, to support their conclusions that Joiner's exposure to PCBs contributed to Joiner's cancer, and that the District Court therefore did not abuse its discretion in excluding their testimony.[14]

In the instant case, the District Court ruled that Dr. Gottheimer's testimony would not be admissible for three reasons. First, the court found that Dr. Gottheimer's educational credentials were not of the highest caliber.[15] Second, during Dr. Gottheimer's voir dire, the District Court found Dr. Gottheimer not to be credible because he had made statements about his credentials that were inconsistent with his deposition testimony. Finally, the District

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[14] Ultimately, the Court, on another issue, reversed the judgment and remanded the proceedings as to whether a material dispute of fact existed as to Joiner's alleged exposure to other elements.

[15] Dr. Gottheimer received his Ph. D. from a correspondence school.

Court found that Dr. Gottheimer's expertise was in property casualty insurance, not life insurance, and that Gottheimer had admitted in his deposition that there are "fundamental" differences in evaluating the two types of insurance. FF PP 101-05; CL PP 17-19.

These three reasons coincide with the three requirements articulated in Paoli II: qualifications, reliability, and fit. The record discloses that Dr. Gottheimer's qualifications were less than stellar. Because he had testified untruthfully at voir dire, his testimony could well have been held unreliable. Finally, Dr. Gottheimer's alleged expertise, limited in any event to methods of investing with respect to property casualty insurance, did not fit with or meet the need of the District Court for expert testimony in life insurance investing. See *Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1055-56 (3d Cir. 1997). The District Court determined that Dr. Gottheimer could not be a credible witness based on admissions secured through the use of his prior sworn testimony. See FF PP 102-104. Because the District Court, as fact-finder, listened to the testimony and assessed the credibility of the witness, these findings are entitled to great deference by this Court. See *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985).

Judge Becker, in his thoughtful and comprehensive dissent, while focusing almost exclusively on the standards for admissibility of scientific expert testimony, nevertheless acknowledges that "the factfinder is ordinarily the arbiter of general credibility," Dissent at 40, and that "the power to evaluate the credibility of witnesses and give testimony its proper weight primarily resides with

the trier of fact." Dissent at 41. He also properly acknowledges that the decision to admit or to exclude expert testimony is reviewed for abuse of discretion.

Judge Becker, however, fails to recognize or credit in his dissent two significant and controlling issues. First, Dr. Gottheimer's testimony does not fall within the scope of scientific testimony, and accordingly, it should not be tested by the particular standards required for testimony based on a particular scientific ethic.[16] See *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433 (11th Cir. 1997), cert. granted sub nom. *Kumho Tire Co. v. Carmichael*, 141 L. Ed. 2d 711, 118 S. Ct. 2339 (1998). It is true of course that we have referred to the Paoli requirements of qualifications, reliability and fit – but we have done so only to emphasize that, measured by any standard, scientific or non-scientific, the District Court did not abuse its discretion in excluding Dr. Gottheimer's testimony.

Second, and more important, the dissent, while acknowledging that it is the fact finder that determines weight and credibility of an expert's testimony, apparently overlooks the distinguishing circumstance here: the fact finder was the District Court judge himself, and not a jury. Judge Hutton made the critical credibility determination that he could not believe the testimony of Dr. Gottheimer, and that being so, no reason has been put forward as to why we should not credit and defer to the District Court's finding. Even if we might have made a

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[16] See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993); *In re Paoli R.R. Yard Litig.*, 35 F.3d 717, 741-43 (3d Cir. 1994).

different determination regarding Dr. Gottheimer's credibility, we are not at liberty to impose our opinion on the District Court.[17]

We would be hard pressed to require a District Court judge sitting in a non-jury case who credibly and with reason found that he could not believe a witness to nevertheless hear the witness's direct examination, cross-examination, and rebuttal examination in an extended trial when he knew that he would only reject it as unbelievable. All the instances and cases cited by the dissent, see, e.g., Dissent at 32 n.1, 46 n.13, are those in which it was for the jury as fact finder to determine credibility and weight of the expert testimony. Thus, those cases are wholly inapplicable to the facts of this case. When the role of the gatekeeper to admit or exclude evidence (the judge) and the role of the factfinder to assess and weigh the evidence that was admitted (the jury) are one and the same, the judge who becomes the factfinder as well as the gatekeeper must be given great deference by this Court, and, as we note below, should not be required to waste

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[17] As the Supreme Court of Maine stated:

> We have previously stated that the determination of the qualifications of expert witnesses is reserved to the sound discretion of the trial judge. It follows, therefore, that appellate decisions affirming the trial court do not necessarily stand for the proposition that the opposite ruling would constitute error.

Hanson v. Baker, 534 A.2d 665, 667 (Me. 1987) (citation omitted); see also *Seese v. Volkswagenwerk A.G.*, 648 F.2d 833, 844 (3d Cir. 1981) ("We recognize that the admission of expert testimony rests within the sound discretion of the district court and that the district court will be reversed only for an abuse of that discretion.").

judicial time. See Fed. R. Evid. 403. Therefore, we cannot say on this record that it was an abuse of the District Court's discretion to exclude Dr. Gottheimer's testimony.

Even if the District Court had abused its discretion, and we hold that it did not, the error must be deemed harmless in light of the District Court's finding that Dr. Gottheimer was not credible. The District Court concluded, "If given the chance to testify, I could not find [Dr. Gottheimer] to be a credible witness given his evasiveness, if not his propensity to state falsehoods." CL P 18. Obviously, hearing testimony from a witness who was given no credence at all by the District Court judge presiding at a bench trial would have resulted in the "waste of time" proscribed by Federal Rule of Evidence 403, particularly where the false statements identified by the judge were material to the purported expert's qualifications.

VII.

ERISA requires a fiduciary to "diversify[ ] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly not prudent to do so." 29 U.S.C. § 1104(a)(1)(C). Meinhardt complains that Unisys invested an excessive amount of Fund investments in Executive Life GICs. As discussed in Unisys I, Congress did not try to quantify diversity with percentages, leaving that determination to the facts and circumstances as found by the courts. *Unisys I*, 74 F.3d at 438-40.

The District Court determined that Meinhardt had not introduced evidence by way of expert testimony as to

what would have constituted a properly diversified fund. At the time Executive Life went into receivership, the Fund had 20% of its assets in Executive Life investments, and the court held this level of diversification to be proper.[18] CL PP 32-33.

Nor did Meinhardt prove his case with respect to the duty to diversity because he did not show that the Fund suffered "large losses" as a result of any failure to diversify. This was an issue that the Court of Appeals specifically held was not known at the summary judgment stage. See *Unisys I*, 74 F.3d at 440. Meinhardt presented no evidence of investments that would have constituted proper diversification in order to prove that Unisys did not properly diversify the investments in the Fund or to enable the District Court to assess losses, if any, to Meinhardt for the difference. FF P 90.

The duty to diversify and resulting damages from a breach of that duty could not be determined from the summary judgment record in Unisys I. Now that the trial has concluded, it is evident to us, as it was to the District Court, that Meinhardt's failure of proof did not lead to any determination that Unisys breached its duty to diversify or that damages resulted.

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[18] The District Court combined the FIF and the ICF for purposes of diversification because the funds "worked together;" that is, the FIF was being phased out in favor of the ICF. Proceeds from matured FIF contracts were invested in the ICF, and no new investments were made in the FIF. FF P 79; App. 1510-12, 4450.

VIII.

Meinhardt claims that Unisys did not fulfill its obligation of making necessary disclosures under ERISA.

In Unisys I, we stated that "a fiduciary may not materially mislead those to which section 1104(a)'s duties of loyalty and prudence are owed." *Unisys I*, 74 F.3d at 440-41. A fiduciary must make disclosures if silence would be harmful. *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993). ERISA also requires plaintiffs to prove losses for any breach of fiduciary duty claim:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach.

29 U.S.C. § 1109(a) (emphasis added). As Meinhardt and the other class plaintiffs were seeking individual relief under 29 U.S.C. § 1132(a)(3) (in contrast to § 1132(a)(2), which only allows relief on behalf of the Plan), Meinhardt was required to prove individual losses. *Varity Corp. v. Howe*, 516 U.S. 489, 507-15, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996).

Although the District Court's discussion of Meinhardt's claims that Unisys breached its duty to disclose information about Executive Life spans 18 pages, we can dispose of this issue on appeal briefly. Essentially, Meinhardt complains that Unisys received reports about Executive Life's financial troubles in early 1990. Meinhardt claims that Unisys (1) did not warn the Fund

participants, (2) drafted misleading letters in order to dispel participants' concern, (3) did not disclose the fact that a high-level Unisys executive had purged his own portfolio of Executive Life securities, and (4) entered into an agreement with Executive Life not to disclose information to participants that would cause participants to change their investments.[19] The District Court held that Meinhardt did not prove that the alleged failures to disclose were material. CL PP 22-23.

We need not address the question of whether the alleged nondisclosures were material, however, because it is clear that Meinhardt did not prove that any alleged failures to disclose caused the participants to suffer damages. CL PP 29-30. The District Court found that Meinhardt and the other class plaintiffs (1) already had actual knowledge of much of the information it is claimed that Unisys failed to disclose, (2) did not read the Plan documents, and (3) testified that they would not have withdrawn or transferred their money from the Fund even if they had known about Executive Life's problems. FF PP 70-71; CL P 28; App. 1681-82, 1688-89.

Moreover, Meinhardt's expert, Tsetsekos, offered testimony on losses suffered as a result of the alleged failures to disclose, but referred only to those losses incurred by the Fund and not to any losses incurred by individual participants named as plaintiffs. FF PP 76-77; CL PP 29-31. Meinhardt also failed to prove individual damages

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[19] The agreement did not prevent Unisys from disclosing information required by law. App. 1702.

suffered by each participant as ERISA requires. 29 U.S.C. § 1132(a)(3).

We hold that these factual findings of the District Court are not clearly erroneous and that they support the conclusion reached by the District Court that Meinhardt failed to prove his claim that Unisys breached its duty of disclosure.

IX.

A final word should be said about Meinhardt's claim for damages. First and foremost, in the absence of proof of a breach of fiduciary duty, no relief in the way of damages or losses could accrue to Meinhardt. We have held that Unisys satisfied ERISA's prudence standard and that accordingly, no breach of fiduciary duty occurred. This being so, no claim for increased interest, i.e., the promised interest minus the actual amount of interest received, or any other damages, can be sustained. As we have noted earlier, Meinhardt had received the return of the entire principal invested as well as some interest.[20]

It is therefore irrelevant as to whether any losses sustained by the Fund from GIC investments could have been offset by any gains derived from other Fund investments. While we acknowledge that a trustee, when he is imprudent and breaches his trust, is liable for all gains

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[20] Even without offsetting the losses with the gains, the three contracts each returned principal with minimal (3-5) interest. FF P 80.

and may not offset losses against them,[21] in the instant case, the Unisys fiduciaries were neither imprudent nor did they breach their fiduciary duties.[22]

Additionally, Meinhardt and the Department of Labor as amicus also argued that the burden of proving causation of damages shifts to the defendant after the plaintiff has proved that the defendant breached a fiduciary duty. Here, the District Court assigned the burden of proof to the plaintiff Meinhardt. Because we have held that Unisys did not breach its fiduciary duties, we have no need to address the issue of which party bears the burden of proving causation of damages resulting from a breach of fiduciary duty. While we recognize that our sister circuits have divided in deciding this question,[23] we have yet to express ourselves on this issue.[24]

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[21] See *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985); Restatement (Second) of Trusts § 213.

[22] In light of our decision in favor of Unisys, we have no need to address Unisys's affirmative defense under 29 U.S.C. § 1104(c), which relieves a trustee of liability if the loss results from the participant's exercise of control.

[23] Compare *Silverman v. Mutual Benefit Life Ins. Co.*, 138 F.3d 98, 105-06 (2d Cir. 1998), cert. denied, 142 L. Ed. 2d 145, 119 S. Ct. 178, 1998 WL 440027 (Oct. 5, 1998) and *Kuper v. Iovenko*, 66 F.3d 1447, 1459-60 (6th Cir. 1995) (burden of proof on plaintiff) with *McDonald v. Provident Indemnity Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995); *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994) (burden of proof on fiduciary defendant).

[24] Cf. *Kemmerer v. ICI Americas, Inc.*, 70 F.3d 281, 290 (3d Cir. 1995) (citing Roth for the proposition that burden of disproving damages shifts to the trustee, but finding no need to shift the burden because the case before the court did not involve a situation where plaintiff had proved a breach of duty and a definite loss); *Nedd v. United Mine Workers of Am.*, 556 F.2d 190,

X.

In sum, we have held that:

(1) The District Court's findings of fact issued after hearing evidence on Meinhardt's ERISA claims will be affirmed as not clearly erroneous.

(2) The District Court's conclusions of law that the Unisys fiduciaries were prudent, and in the alternative, that a hypothetical prudent fiduciary would have made the same investments in Executive Life GICs, also will be affirmed.

(3) Although we do not agree with the District Court's additional discussion of an arbitrary and capricious standard in reviewing the investments made by the ERISA fiduciaries, this discussion was superfluous, constitutes no more than harmless error, and does not affect our judgment.

(4) The District Court did not abuse its discretion in excluding the testimony of Meinhardt's proposed expert witness on the issue of Unisys's prudence, and in any event, that action was harmless in light of the District Court's finding that the expert was not credible.

(5) The District Court did not err in denying relief to Meinhardt inasmuch as no losses or damages could be sustained. As a consequence, we have found it unnecessary to address the disputed issue of which party bears the burden

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211 (3d Cir. 1977) (holding that shifting the burden of causation to the fiduciary is an appropriate rule in an LMRA case).

of proving causation of damages that result from a breach of fiduciary duty.

(6) The District Court did not err in holding that Meinhardt's other ERISA claims, failure to diversify and failure to disclose information, were not proved.

Thus, we will affirm the District Court's orders of November 24, 1997, and January 9, 1998, in favor of Unisys and against Meinhardt.

Each party shall bear its own costs.

DISSENT BY: BECKER

DISSENT: BECKER, Chief Judge, dissenting

Although I join in Parts I through V and VII through IX of the majority's opinion, I believe that the majority has made a significant error regarding expert testimony, and I dissent on this point. Because I believe that this error is not harmless, I believe we should vacate the judgment and remand this case for a new trial.

In concluding that the District Court properly excluded the testimony of Dr. Gottheimer, the majority seriously misconceives the proper approach to the admission of expert opinion testimony under Federal Rule of Evidence 702. As an initial point, the majority overstates the degree to which we owe deference to the District Court's decision in a case, such as this, tried to the court. The District Court's decision deserves no additional deference simply because the court sat as both evidentiary gate-keeper and fact-finder. If anything, the practicalities

of the matter suggest that the trial court in such a situation should be more reluctant than usual to exclude evidence, although I do not suggest that we should apply a correspondingly more stringent standard of review.

The District Court and the majority also make three important errors in analyzing the substantive requirements of Rule 702. First, the majority confuses the reliability of an expert witness – a matter for the jury – with the reliability of his or her methodology – a matter initially for the trial judge – and therefore erroneously concludes that questions about an expert witness's general credibility are a proper basis for excluding his or her testimony. The question for the judge under Rule 702 is not whether the witness is reliable but whether the methodology the expert uses in reaching his conclusions is reliable. As to this latter point, the witness's general credibility is simply irrelevant; the relevant issues in determining the reliability of an expert's principles and methods are of the sort set forth with respect to scientific testimony in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-95, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993).

Second, the majority misconstrues the nature of the requirement of "fit" between the expert's testimony and the facts at issue. The majority concludes that the District Court correctly found that no fit exists in this case because Dr. Gottheimer's experience, in the area of property-casualty insurance, on which his testimony is based, is not in the specific area – life insurance – with which the facts in this case deal. But the majority's focus on the connection between Dr. Gottheimer's claimed basis for being an expert and the facts at issue, as opposed to the connection between the substance of his testimony and

the facts, is irrelevant to the question of fit. Their concern about his background should more appropriately be directed at Dr. Gottheimer's qualifications, not the fit between his testimony and the facts.

Third, the majority permits the District Court to set the qualifications bar for expert testimony too high. It approves the District Court's rejection of the expert's testimony simply because his qualifications are not of the "highest caliber." This conclusion is inconsistent with our longstanding liberal approach to the matter of expert witness qualifications. Also, the connection between Dr. Gottheimer's expertise and the issues in this case – which the majority discusses in the context of fit – are not too remote for him to qualify as an expert under Rule 702.

Finally, I think that the majority wrongly concludes that any error in the exclusion of Dr. Gottheimer's testimony was harmless. While improper admission of evidence is usually harmless error in a bench trial, the improper exclusion of an expert witness who would have offered a party's sole expert testimony on an element of its case ordinarily is not harmless. The fact that the District Court found some inconsistencies in Dr. Gottheimer's voir dire testimony was not a sufficient basis for changing the ordinary rule. Such inconsistencies are not enough to convince me that it is highly probable that Dr. Gottheimer's testimony, if admitted, would not have changed the outcome. This is especially true in light of the fact that the inconsistencies the District Court discusses were at worst minor.

I. Overview of Rule 702

Under Rule 702, "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702. The Supreme Court has recognized that Rule 702, although it limits the scope of permissible evidence, is part of "the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.' " *Daubert*, 509 U.S. at 588 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169, 102 L. Ed. 2d 445, 109 S. Ct. 439 (1988)). We have recognized that this "principle of liberal admission of expert testimony is found in Rule 702 itself, in the advisory committee note to the rule, and in our case law."[1]

To these ends, Rule 702 embodies three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability and fit. See *In re Paoli R.R. Yard PCB Litig.* ("*Paoli II*"), 35 F.3d 717, 741-43 (3d Cir. 1994). First, an expert witness must be qualified by virtue of specialized expertise. See Fed. R. Evid. 702 (permitting expert testimony of a witness "qualified as an expert by

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[1] *Habecker v. Copperloy Corp.*, 893 F.2d 49, 51 (3d Cir. 1990); accord *Waldorf v. Shuta*, 142 F.3d 601, 625 (3d Cir. 1998) (citing the "policy of liberal admissibility of expert testimony"); *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 782 (3d Cir. 1996) (citing "our liberal approach to admitting expert testimony"); *United States v. Downing*, 753 F.2d 1224, 1230 (3d Cir. 1985) (citing "the liberal standard of admissibility mandated by Rule 702"); *Knight v. Otis Elevator Co.*, 596 F.2d 84, 88 (3d Cir. 1979).

knowledge, skill, experience, training, or education"); *Paoli II*, 35 F.3d at 741. Second, "an expert's testimony is admissible so long as the process or technique the expert used in formulating the opinion is reliable." *Paoli II*, 35 F.3d at 742 (citing *Daubert*, 509 U.S. at 589-90). Third, "expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert*, 509 U.S. at 591 (citations omitted).[2]

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[2] It is not a settled question in this Circuit whether the Daubert requirements apply to nonscientific testimony such as may be at issue here. *See Lauria v. National R.R. Passenger Corp.*, 145 F.3d 593, 599 n.7 (3d Cir. 1998) (questioning, but not resolving, whether Daubert analysis should apply to testimony of expert in train track maintenance); *United States v. Velasquez*, 33 V.I. 265, 64 F.3d 844, 850 (3d Cir. 1995) (questioning the propriety of applying Daubert to handwriting analysis, but applying it in an exercise of caution). This question is currently before the Supreme Court. See *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433 (11th Cir. 1997), cert. granted sub nom. *Kumho Tire Co. v. Carmichael*, 141 L. Ed. 2d 711, 118 S. Ct. 2339 (1998). The current proposed amendment to Rule 702 would apply a distillation of the Daubert analysis to all expert testimony. See Fed. R. Evid. 702 (proposed amendment 1998) (further limiting admissibility of expert testimony to where "(1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts").

The majority contends that I have erred by focusing on Daubert analysis in a case in which it might not apply. See Slip Op. at 23. But even to the extent the majority turns out to be correct that a strict Daubert analysis does not apply, my conclusions would not change. First, I do not believe that the result would be any different if we were to apply the principles of Rule 702 sans Daubert. In fact, since Daubert imposes additional requirements for scientific testimony beyond the

II. Standard of Review

As an initial matter, I think the majority errs in its analysis of the applicable standard of review and the extent to which we owe deference to the District Court's decision. Of course, the decision whether to admit or exclude expert testimony is largely within the hands of the trial judge. We review such a decision for abuse of discretion. See *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 517, 139 L. Ed. 2d 508 (1997) ("We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings." (citations omitted)); *In re Paoli R.R. Yard PCB Litig.* ("*Paoli I*"), 916 F.2d 829, 856 & n.33 (3d Cir. 1990). The standard does not change when we are reviewing a court's decision to exclude, as opposed to admit, expert testimony, in spite of the liberal standard for the admission of such testimony. *See Joiner*, 118 S. Ct. at 517.

Even though we apply an abuse of discretion standard of review, however, "to the extent the district court's ruling turns on an interpretation of a Federal Rule of Evidence our review is plenary."[3] Furthermore, although

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usual requirements for expert testimony, not applying Daubert would provide even greater reason to believe that Dr. Gottheimer's testimony should have been admitted. Thus, the majority's criticism supports my contention. Second, even if the Supreme Court in Kumho decides that strict Daubert analysis should not apply to non-scientific testimony, I still think that the basic principles of reliability and fit would be relevant in determining the admissibility of expert testimony under Rule 702.

[3] *DeLuca v. Merrell Dow Pharms., Inc.*, 911 F.2d 941, 944 (3d Cir. 1990) (citing *In re Japanese Elec. Prods. Antitrust Litig.*, 723

our review is highly deferential, it is not a complete bar to reversing a district court's decision even where the court does not commit purely legal error. See, e.g., *Paoli I*, 916 F.2d at 855-56 (rejecting as an abuse of discretion the trial court's insistence on certain credentials as expert qualifications); 4 Weinstein's Federal Evidence § 702.02(2) n.9 (2d ed. Nov. 1998) (collecting cases).

The majority concludes that the fact that this case involved a bench trial requires additional deference to the District Court's evidentiary exclusion decision. In reaching this conclusion, the majority relies on *Goodman v. Highlands Insurance Co.*, 607 F.2d 665 (5th Cir. 1979), which states that "a trial judge sitting without a jury is entitled to even greater latitude concerning the admission or exclusion of evidence." *Goodman*, 607 F.2d at 668. The majority asserts that, after Joiner – in which the Supreme Court held that the same abuse of discretion standard of review applies to an evidentiary ruling on expert testimony regardless of whether the trial court admits or excludes the evidence – the "Goodman" rule "has been given increased viability." Slip Op. at 20. For a variety of reasons, I cannot agree with the majority's conclusion that our review is affected by the fact that this case was tried to the court.

As an initial matter, Goodman does not support the meaning the majority draws from it. The statement in Goodman upon which the majority relies refers not to the

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F.2d 238, 277 & n.43 (3d Cir. 1983), revd. on other grounds sub. nom. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)); accord *Barker v. Deere & Co.*, 60 F.3d 158, 161 (3d Cir. 1995).

trial court's decision on admissibility but to whether the trial court's decision, if erroneous, was a harmless error.

This reading is made manifest by an examination of the sentence following that quoted above:

> In a non-jury case, the admission of incompetent evidence will not warrant reversal unless all of the competent evidence is insufficient to support the judgment, or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would otherwise not have been made.

Goodman, 607 F.2d at 668 (citations omitted). This is simply a restatement of the familiar harmless error test for review of decisions admitting evidence in bench trials.[4] It is, however, irrelevant to our determination of whether

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[4] As we have stated:

> It is well settled that in a nonjury case, an appellate court will not reverse on the basis of an erroneous admission of evidence unless (1) there is insufficient evidence other than the challenged evidence to support the district court's conclusion, or (2) the district court is induced by the challenged evidence to make an essential finding that it would not have made otherwise.

United States v. Local 560, Intl. Bhd. of Teamsters, 780 F.2d 267, 278 (3d Cir. 1985) (alteration in original) (quoting *De Laval Turbine, Inc. v. West India Indus., Inc.*, 502 F.2d 259, 263-64 (3d Cir. 1974)); accord 12 Rya W. Zobel, Moore's Federal Practice § 61.06(2) (3d ed. 1998). This is a sensible rule based on the assumption that judges are more capable of ignoring prejudicial or irrelevant evidence than juries. See 1 Weinstein's, supra, § 103.41(4)(a) ("At one end of the scale is the non-jury trial in which the judge is often assumed, even in a criminal case, to have disregarded inadmissible evidence in arriving at a decision.").

the district court's decision to exclude expert testimony from evidence is reversible error.[5]

Furthermore, even assuming the majority correctly states the Fifth Circuit's Goodman rule, I think that rule is not a proper one and would not follow it. The Federal Rules of Evidence apply with full force to bench trials. See Fed. R. Evid. 1101(b); 9 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2411, at 587 (2d ed. 1995) ("In theory, the Federal Rules of Evidence apply equally in court trials and jury trials."). After all, a trial is a trial. To me, the proposition that we owe more deference to trial court decisions excluding evidence in bench trials is inconsistent with the Federal Rules and encourages sloppy district court decisionmaking.[6]

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[5] Recent cases from the same court reveal that the quoted portion of Goodman in fact refers to harmless error analysis. See, e.g., *Southern Pac. Transp. Co. v. Chabert*, 973 F.2d 441, 448 (5th Cir. 1992) (quoting Goodman and citing it in support of the harmless error standard).

[6] The majority suggests that I have failed to recognize the critical fact in this case: that the judge was the fact-finder as well as the Rule 702 gatekeeper. The majority is incorrect. Of course I recognize this fact, but think that it should make no difference in our analysis. The majority essentially contends that, once the trial judge in a bench trial makes up his or her mind during an in limine hearing that a witness is not credible, that decision is cast in concrete and the judge will close his or her ears to any further (trial) testimony from the witness. Concomitantly, the majority suggests that, with any witness, the court proceeding to a bench trial may exclude a prospective witness's testimony based not on its admissibility but on the witness's credibility. See Slip Op. at 23 ("We would be hard pressed to require a District Court judge sitting in a non-jury case who credibly and with reason found that he could not believe a witness to nevertheless hear

If anything, trial courts should be more chary of excluding evidence in bench trials than in jury trials. See *Builders Steel Co. v. Commissioner*, 179 F.2d 377, 379 (8th Cir. 1950) ("[A] trial judge who, in the trial of a nonjury case, attempts to make strict rulings on the admissibility of evidence, can easily get his decision reversed by excluding evidence which is objected to, but which, on review, the appellate court believes should have been admitted."), quoted in 9 Wright & Miller, supra, § 2411, at 587. The better course is to admit the evidence and then take factors that otherwise might affect its admissibility into consideration in determining its weight, rather than waste time debating the propriety of admitting the evidence.[7] I believe the majority's approach grants undue deference to trial court's decisions excluding evidence in bench trials.

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the witness's direct examination, cross-examination, and rebuttal examination in an extended trial when he knew that he would only reject it as unbelievable."). I, to the contrary, think it would be preferable for the trial judge to listen to the witness and keep his or her mind open to the possibility that the entirety of the witness's trial testimony could change his or her view of the witness's credibility. Listening, after all, is a major part of the judge's job.

[7] See *Builders Steel*, 179 F.2d at 379 (quoting *Donnelly Garment Co. v. NLRB*, 123 F.2d 215, 224 (8th Cir. 1941)). In *Donnelly Garment*, the court noted that it is usually more efficient in a bench trial for the court to simply admit questionable evidence, and then take such questions into consideration in determining the weight it should be given. See 123 F.2d at 224.

III. Rule 702 Requirements

I now turn to the substantive requirements of Rule 702. Under Rule 702, expert testimony is admissible only if it meets the requirements of Rule 702: qualifications, reliability and fit. The majority concludes that the District Court properly found that Dr. Gottheimer's testimony met none of these requirements. I disagree, and discuss each of these factors, although not in the usual order.

A. Reliability

The majority begins with the indisputable premise that reliability is a key factor in determining the admissibility of expert testimony. "Under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Joiner*, 118 S. Ct. at 517 (quoting *Daubert*, 509 U.S. at 589). From this, the majority concludes that, as part of the reliability analysis, a trial court may consider the general credibility of a witness in determining whether his or her testimony is appropriately admitted as expert witness testimony. See Slip Op. at 20 ("Thus in our view, the Court's emphasis on reliability as well as on relevancy embraces within its standard the credibility of the witness proffering expert opinion."). Accordingly, the majority holds that, since the District Court found that Dr. Gottheimer was not a credible witness it could properly exclude his expert testimony under Rule 702. The majority misconceives the fundamental nature of the reliability inquiry under Daubert. The reliability inquiry focuses not on the witness's reliability in an evidentiary sense, but on

the reliability of the methodology that the expert applies in arriving at an opinion.

> In order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Daubert, 509 U.S. at 590 (footnote omitted). This inquiry focuses on the expert's principles and methodology, not his results.

> The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity – and thus the evidentiary relevance and reliability – of the principles that underlie the proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

Daubert, 509 U.S. at 594-95. Under Rule 702, the trial court's preliminary reliability analysis in making an admissibility determination must focus on the witness's methods, not his or her testimony as a whole.[8] A current

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[8] Even the broadest understandings of the *Daubert* reliability inquiry recognize that such reliability determinations are limited to the witness's methods and related matters. "The broadest reading of *Daubert* is that it applies to all reliability issues presented by all expert testimony. Under this interpretation, all reliability issues raised by an expert's application, methodology, reasoning, or underlying theories are

proposed amendment to Rule 702 reemphasizes this focus on the reliability of the methodology, as opposed to the witness.[9]

Credibility plays no appropriate part in the analysis of the reliability of a proposed expert's methodology. The Court in *Daubert* recognized a number of factors pertinent to the reliability inquiry, including testability, peer review or publication, potential rate of error, existence of standards and controls, and general acceptance. See 509 U.S. at 593-94. We, as well as others, have suggested numerous additional factors relevant to reliability as set forth in the margin.[10] The key point is that none of these

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admissibility questions to be resolved by the gatekeeper-judge." 29 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure § 6266, at 290 (1997).

[9] The Judicial Conference of the United States's Standing Committee on Rules of Practice and Procedure is currently considering an amendment to Rule 702 proposed by its Advisory Committee on Rules of Evidence that would permit the admission of expert testimony if "(1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts." Fed. R. Evid. 702 (proposed amendment 1998). Under the proposed rule, the trial judge must determine whether the proposed testimony "is properly grounded, well-reasoned and not speculative before it can be admitted." Fed. R. Evid. 702 advisory committee's note (proposed amendment 1998). "If there is a well-accepted body of learning and experience in the expert's field, then the expert's testimony must be grounded in that learning and experience to be reliable, and the expert must explain how the conclusion is so grounded." Id.

[10] See, e.g., *Downing*, 753 F.2d at 1238-39 (listing additional factors: novelty, specialized literature, and non-judicial uses of techniques); *Joiner*, 118 S. Ct. at 519 (whether the expert has

factors requires consideration of the proffered expert's credibility in general. "Evaluating the reliability of scientific methodologies and data does not generally involve assessing the truthfulness of the expert witnesses. . . . " *Paoli II*, 35 F.3d at 749.[11] Of course, a particular witness

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unjustifiably extrapolated from an accepted premise to an unfounded conclusion); *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir.) (whether "the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting"), cert. denied, 521 U.S. 1104, 117 S. Ct. 2480, 138 L. Ed. 2d 989 (1997); *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) ("whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying"); *Claar v. Burlington N.R.R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994) (whether the expert has adequately accounted for obvious alternative explanations).

[11] Courts have held in numerous other cases that credibility is irrelevant to determining whether a proposed expert witness's testimony is admissible under Rule 702, and particularly whether it is based on reliable methodology. See, e.g., *Breidor v. Sears, Roebuck & Co.*, 722 F.2d 1134, 1138-39 (3d Cir. 1983) ("Where there is a logical basis for an expert's opinion testimony, the credibility and weight of that testimony is to be determined by the jury, not the trial judge."); see also *Kannankeril v. Terminix Intl., Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) ("If the expert meets liberal minimum qualifications [under Rule 702], then the level of the expert's expertise goes to credibility and weight, not admissibility."). For example, expert witnesses cannot be excluded on the basis of bias. See, e.g., *Marshall v. Perez Arzuaga*, 828 F.2d 845, 851-52 (1st Cir. 1987); *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1135-36 (5th Cir. 1985). Similarly, factual errors in a witness's testimony are not grounds for excluding the witness from testifying as an expert. See *Paoli II*, 35 F.3d at 753-54. Finally, general attacks on credibility based on a lack of personal knowledge are not a

can lie about whether one of the factors mentioned above is present. But the witness's general credibility – i.e., credibility based on matters not directly related to these factors, such as bias or unrelated prior inconsistent statements – is not relevant to a trial court's preliminary determination that these factors are present. These factors are relatively objective matters that the court can generally analyze independent of the witness's testimony about them. For example, a court is fully capable of determining whether a theory or method is testable.

Furthermore, permitting the trial court to consider the general credibility of an expert witness in its analysis of the reliability of proposed expert opinion testimony improperly trenches on the province of the fact-finder. The fact-finder is ordinarily the arbiter of general credibility. Rule 702 is intended not to impinge on the authority of the fact-finder in making credibility determinations, but rather to ensure that the fact-finders' ability to find facts independently is not overwhelmed by complex and authoritative-seeming expert testimony. See 29 Wright & Gold, supra, § 6262, at 179 ("If the trier of fact is unable or disinclined to question the expert's opinion, it surrenders its central function to an expert whose testimony may be unreliable."). In order to avoid this eventuality, Rule 702 provides for a preliminary inquiry into whether proposed expert testimony is the kind that is appropriately admitted into evidence, i.e., that the method is reliable and based on expertise. See id. at 183-84. But this inquiry cannot extend into matters that are the proper

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proper basis for excluding expert testimony. See *Dixon v. International Harvester Co.*, 754 F.2d 573, 580 (5th Cir. 1985).

province of the fact-finder, such as general credibility. See id. at 184 ("Importantly, however, Rule 702 on its face creates no general power in the trial judge to exclude expert testimony on the grounds that it is unreliable.").

This limitation on the power of the trial court to admit and exclude expert testimony rests on sound policy considerations. First, it is emblematic of the Rules' generally liberal approach to the admissibility of evidence, discussed above. See supra Part I. Second, it reflects the fact that the power to evaluate witness's credibility lies traditionally with the fact-finder, not the trial court making evidentiary rulings. See 29 Wright & Gold, supra, § 6262, at 185 ("The power to evaluate the credibility of witnesses and give testimony its proper weight primarily resides with the trier of fact.").

Finally, it rests on the general assumption underlying the Federal Rules of Evidence as a whole: the fact-finder is best situated to determine the credibility of witnesses. See id. at 185 ("Juries generally have the ability to accurately weight and evaluate witness credibility."). "Accordingly, the most common judicial response to attacks on the reliability of expert testimony is that such matters go to weight, not admissibility." Id. at 185-86. The Court in *Daubert* recognized the importance of leaving such matters to the fact-finder, and not determining them on evidentiary grounds:

> Respondent expresses apprehension that abandonment of "general acceptance" as the exclusive requirement for admission will result in a "free-for-all" in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions. In this regard respondent seems

> to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

Daubert, 509 U.S. at 595-96 (citation omitted; emphasis added).

Accordingly, I conclude that the District Court erred to the extent that it considered Dr. Gottheimer's general credibility as a factor in determining whether the principles and methodology underlying his proposed expert testimony were reliable under Rule 702. This result is unaffected by the fact that the District Court – post hoc – went ahead and made credibility findings that arguably would have resulted in his rejection of Dr. Gottheimer's testimony in its role as fact-finder. I deal with this aspect of the matter in my discussion of harmless error. See infra Part IV. Questions about Dr. Gottheimer's credibility should have been left for substantive fact-finding, not evidentiary rulings. Since the District Court and Unisys suggest no other concerns about the reliability requirement, I would conclude that Dr. Gottheimer's proposed testimony satisfies it.

B. Fit

The majority also concludes that the District Court properly found that Dr. Gottheimer's testimony did not fit with the question in issue at the trial. In particular, the majority concludes that Dr. Gottheimer's experience and knowledge lay in a field not sufficiently connected with

the question at issue to meet the requirement of fit. "Dr. Gottheimer's alleged expertise, limited in any event to methods of investing with respect to property casualty insurance, did not fit with or meet the need of the District Court for expert testimony in life insurance investing." Slip Op. at 21. The majority misconceives the requirement of fit under Rule 702.

The requirement of fit is essentially a relevance requirement. Under Rule 702, expert testimony is admissible if it "will assist the trier of fact." Fed. R. Evid. 702. "This condition goes primarily to relevance." *Daubert*, 509 U.S. at 591. "Admission depends upon the 'fit,' i.e., upon a specific proffer showing that scientific research has established" some point relevant to the facts of the case. *United States v. Downing*, 753 F.2d 1224, 1226 (3d Cir. 1985). We have further clarified this point:

> An additional consideration under Rule 702 – and another aspect of relevancy – is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute. In this regard, we hold that a defendant who seeks the admission of expert testimony must make an on-the-record detailed proffer to the court, including an explanation of precisely how the expert's testimony is relevant to the [factual issue] under consideration. The offer of proof should establish the presence of factors . . . which have been found by researchers to [provide a basis for the proffered opinion]. Failure to make such a detailed proffer is sufficient grounds to exclude the expert's testimony.

753 F.2d at 1242 (citations omitted); see also *Lauria v. National R.R. Passenger Corp.*, 145 F.3d 593, 600 (3d Cir. 1998); *United States v. Velasquez*, 33 V.I. 265, 64 F.3d 844, 850 (3d Cir. 1995).

The majority errs in concluding that Dr. Gottheimer's field of expertise has any relevance to the fit inquiry. As the foregoing discussion of the fit requirement shows, it is satisfied if the proffered expert opinion is relevant to a factual issue before the fact-finder. The expert's field of expertise is irrelevant to an inquiry into the connection between the opinion itself and the issues in the case. A simple example shows this. In *Lauria*, a railroad worker slipped and was injured when he stepped on a loose railroad tie that was sitting between some tracks. "The primary issue [was] whether Amtrak was negligent in failing to remove a [railroad] tie from Lauria's workplace." *Lauria*, 145 F.3d at 600. An expert opinion "that the tie was a dangerous obstruction that should have been discovered and removed and, . . . that Amtrak's negligence made the workplace unsafe" clearly satisfies the requirement of fit. 145 F.3d at 600.

But the expertise of the proponent of the opinion is irrelevant to this inquiry. This is true even if the witness proposing to testify to the above opinion is a medical doctor who has no experience with train tracks. Under the majority's reasoning, however, the doctor's testimony would not meet the fit requirement. Clearly, a medical doctor with no experience working with train tracks has no expertise with regard to the placement of loose railroad ties. If Dr. Gottheimer's testimony would not meet the fit requirement because his expertise lay in a different field of insurance than that in issue in the case, clearly the

hypothetical doctor cannot provide testimony that meets the fit requirement. But the doctor's testimony should be excluded because of his lack of qualifications, not because of a supposed lack of fit. The proposed expert's expertise is simply irrelevant to determining whether the proffered expert opinion is relevant to issues in the case.

As this example shows, the majority's and the District Court's concerns about the connection between Dr. Gottheimer's expertise and the issues in the case are actually relevant to the step of the Rule 702 inquiry which I consider infra: qualifications. Under Rule 702, a witness can offer an expert opinion if he or she is "qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. The nature of a witness's specific field of expertise is part of the expert's background that is considered in determining whether a witness is qualified. See *Paoli II*, 35 F.3d at 741.[12]

I think a proper fit inquiry would show that Dr. Gottheimer's testimony meets the fit requirement. Plaintiffs' counsel said that Dr. Gottheimer would have

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[12] In fact, the case the majority cites in support of its conclusion that Dr. Gottheimer's testimony does not meet the fit requirement involved an inquiry into the witness's qualifications, not the fit between his proposed testimony and the issues in that case. See *Surace v. Caterpillar, Inc.*, 111 F.3d 1039 (3d Cir. 1997). In *Surace*, the plaintiff offered the testimony of an electromechanical engineer concerning workers' habituation to auditory warning devices. The district court excluded Brink's testimony and we affirmed, noting that the expert's experience was limited to mechanical, as opposed to human, factors in design, and he therefore was not qualified to testify about the latter. See 111 F.3d at 1055-56.

testified that certain standard tests exist in the insurance industry to analyze the financial condition of insurance companies, and that he was familiar with those tests. He would have further testified that he performed these tests on Executive Life data, and concluded "that the tests set up certain red flags that should have caused a person familiar with the tests and performing the tests, to ask further questions about the solvency and the credit worthiness of Executive Life." I think this is the kind of "on-the-record detailed proffer" that we required in Downing, "including an explanation of precisely how the expert's testimony is relevant to" determining whether Unisys acted prudently. *Downing*, 753 F.2d at 1242. Accordingly, I would conclude that Dr. Gottheimer's proposed testimony meets the fit requirement. The nature of Dr. Gottheimer's expertise, and its connection with the factual issues in this case, are relevant only to the Rule 702 inquiry into qualifications, to which I now turn.

C. Qualifications

The majority also concludes that the District Court properly excluded Dr. Gottheimer's testimony because he was not qualified as an expert with respect to the issues in this case. Specifically, the majority adopts the District Court's conclusion that Dr. Gottheimer was not qualified because his "qualifications were less than stellar." Slip Op. at 21. The District Court noted that "Dr. Gottheimer claims a doctoral degree from a correspondence school, an additional ground for my refusal to qualify him as an expert." *In re Unisys Sav. Plan Litig.*, No. 91-3067, 1997 WL 732473, at *26 (E.D. Pa. Nov. 24, 1997). In addition, as discussed above, see supra section III.B, the majority

concludes that the District Court properly rejected Dr. Gottheimer's testimony because his field of expertise was not sufficiently connected to the issues in the case. "Dr. Gottheimer's experience in the insurance area was limited to property casualty insurance and not life insurance." *Unisys*, 1997 WL 732473, at *22. Neither of these are appropriate grounds for excluding an expert witness for lack of qualifications.

The requirement that an expert witness be qualified is well established. A witness may only provide expert testimony to the extent that he or she is "qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. The bases for concluding that a witness is qualified are flexible. "Insistence on a certain kind of degree or background is inconsistent with our jurisprudence in this area." *Paoli I*, 916 F.2d at 855; accord *Waldorf v. Shuta*, 142 F.3d 601, 626 (3d Cir. 1998) ("In considering the qualification of witnesses as experts, we stress that ordinarily an otherwise qualified witness is not disqualified merely because of a lack of academic training."); *Paoli II*, 35 F.3d at 741 ("We have eschewed imposing overly rigorous requirements of expertise and have been satisfied with more generalized qualifications."). A particular educational background is unnecessary; practical experience is sufficient to conclude that a witness is qualified as an expert. See *Lauria*, 145 F.3d at 599 (citing *American Tech. Resources v. United States*, 893 F.2d 651, 656 (3d Cir. 1990)). "Following this logic, it is an abuse of discretion to exclude testimony simply because the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does

not have the specialization that the court considers most appropriate."[13]

Although, as always with evidentiary questions, we apply a deferential standard of review to a trial court's determination of whether a proposed expert is qualified, we have on numerous occasions found that a district court abused its discretion in excluding a proffered expert because of his or her qualifications. Some of these cases are summarized in the margin.[14]

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[13] *Holbrook*, 80 F.3d at 782 (citing Paoli I, 916 F.2d 829 at 856); accord *Kannankeril*, 128 F.3d at 809 ("Whether the appellants' expert might have done a better job is not the test."); *Paoli II*, 35 F.3d at 741 ("Exclusion was not the proper remedy 'simply because the experts did not have the degree or training which the district court apparently thought would be most appropriate.' " (quoting *Paoli I*, 916 F.2d at 856)).

[14] See *Lauria*, 145 F.3d at 599 ("Slavin's twenty years of experience with track equipment, maintenance, and safety procedures qualified him as an expert who could testify as to Amtrak's responsibility to inspect and maintain the track in a safe condition," even though he did not have particularized training other than that which anyone who had done such work for twenty years would have); *Holbrook*, 80 F.3d at 781-82 (reversing exclusion of treating physician's testimony as to whether plaintiff's cancer was mesothelioma; district court had reasoned that doctor was not qualified because he was not an oncologist; stating that trial court erroneously "restricted Dr. Carpenter's testimony based on a requirement that the witness practice a particular specialty to testify concerning certain matters"); *Paoli I*, 916 F.2d at 856 (district court excluded witnesses who would have testified about gas chromatography tests and differential diagnoses, because they lacked degrees in chemistry and medicine respectively: "In light of the liberal Rule 702 expert qualification standard, we hold that the district court abused its discretion in excluding portions of [the experts'] testimony simply because the experts did not have the

Supported by these cases, I believe that Dr. Gottheimer was in fact qualified to offer the expert testimony proffered, and that the District Court's conclusion to the contrary was an abuse of discretion. The District Court found that Dr. Gottheimer was not qualified on two grounds: the nature of his educational credentials and the distinction between his experience in property-casualty insurance companies and the issues in the case involving life insurance companies. In light of the case law discussed in the margin above, both of these findings are inconsistent with the exercise of sound discretion.

The District Court concluded that Dr. Gottheimer could not be qualified because his doctorate was awarded by a correspondence school. If this were plaintiffs' sole basis for claiming that Dr. Gottheimer was qualified, I would probably agree with the District Court. It was not, however. Rather, the record discloses numerous grounds on which to conclude that Dr. Gottheimer was qualified

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degree or training which the district court apparently thought would be most appropriate." (footnote omitted)); *Habecker*, 893 F.2d at 52-53 (concluding that district court abused its discretion when it excluded expert testimony concerning connection between lack of operator restraints and plaintiff's injury, where plaintiff was injured when he was thrown from the cab of a fork-lift; district court's sole reason for finding expert was not qualified was because he lacked an engineering degree); *Knight*, 596 F.2d at 88 (finding error in district court's exclusion of expert testimony concerning whether unguarded elevator control buttons were a design defect "because it believed that such expertise would require some background in the design and manufacture of elevators," which proposed expert lacked; noting our "reluctance to require highly particularized, sub-specialization on the part of experts").

as an expert. Dr. Gottheimer's resume demonstrates his expertise through three distinct areas: experience, education and teaching. First, he has worked for a dozen years as a consultant in the insurance industry, following thirty years of employment by various insurance companies. His consulting work has included analyses of both property-casualty and life insurance companies.[15] Second, he has bachelor's and master's degrees in insurance-related fields, as well as a doctorate from a correspondence school.[16] He also possesses several professional

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[15] The District Court held that Dr. Gottheimer was not qualified because his experience lay largely in the area of property-casualty insurance, not life insurance, noting that Dr. Gottheimer testified that there were "fundamental differences" between the two. See 1997 WL 732473, at *22. This conclusion contradicts our holdings in Knight and Holbrook, in which we reversed district courts' exclusions of experts whose expertise the trial courts concluded was not sufficiently specialized. As we emphasized in those cases, we are reluctant "to require highly particularized, sub-specialization on the part of experts." *Knight*, 596 F.2d at 88; accord *Holbrook*, 80 F.3d at 782. Any differences between the two areas "should go to the weight, and not the admissibility, of [the expert's] opinion." *Knight*, 596 F.2d at 88.

[16] The District Court's focus on the nature of Dr. Gottheimer's doctorate and its consequent implicit dismissal of his other qualifications is also inconsistent with the exercise of sound discretion. If the district courts abused their discretion in Habecker, Paoli I and Lauria by insisting that the expert have a particular type of degree, the District Court in this case erred in insisting that the expert have not just a particular degree, but a degree from a particular kind of school. Cf. *Lauria*, 145 F.3d at 599; *Paoli I*, 916 F.2d at 856.

Furthermore, the District Court's reliance on *Van Blargan v. Williams Hospitality Corp.*, 754 F. Supp. 246 (D.P.R. 1991), in discounting Dr. Gottheimer's degree is misplaced. In that case,

affiliations in insurance professionals' organizations. Finally, Dr. Gottheimer has taught for over twenty-five years at the College of Insurance. The College of Insurance is an accredited, industry-sponsored school that offers classes in all aspects of insurance business. He is now on the full-time faculty there, and has taught courses in a variety of fields, including insurance company management.

In light of these extensive qualifications, I have no doubt that Dr. Gottheimer was qualified and should have been permitted to testify as an expert under Rule 702. The District Court's decision to the contrary was an abuse of discretion. As the majority points out, the District Court refused to qualify Dr. Gottheimer because his qualifications "were not of the highest caliber." Slip Op. at 21. But in light of our longstanding jurisprudence, this is not an appropriate basis for excluding a proffered expert witness. See *Kannankeril v. Terminix Intl., Inc.*, 128 F.3d 802, 809 (3d Cir. 1997); *Holbrook*, 80 F.3d at 782; *Paoli II*, 35 F.3d at 741. Accordingly, I must conclude that the District Court abused its discretion in excluding his testimony on this basis.

For all these reasons, I think that Dr. Gottheimer should have been permitted to testify as an expert witness under Rule 702. As discussed above, Dr. Gottheimer

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the district court excluded an expert because, in addition to discounting his doctorate from a correspondence school, the court found that he had no other satisfactory qualifications. See *Van Blargan*, 754 F. Supp. at 248-49. Here, by contrast, Dr. Gottheimer has numerous other qualifications in addition to his doctorate.

fully met all three of the Rule 702 requirements: qualifications, reliability and fit. The only remaining question is whether that error was reversible or harmless error.

IV. Harmless Error

In the closing paragraph of its discussion of the Rule 702 evidentiary issue, the majority concludes that, even if the District Court did commit an error in excluding Dr. Gottheimer's testimony, the error was harmless. In reaching this conclusion, it relies on the District Court's statement that it "could not find [Dr. Gottheimer] to be a credible witness given his evasiveness if not his propensity to state falsehoods." 1997 WL 732473, at *26. The District Court pointed to a few alleged inconsistencies in Dr. Gottheimer's deposition and trial testimony in support of this conclusion. The majority concludes that, since the District Court would not have believed Dr. Gottheimer's testimony, his testimony could not have been given any weight if admitted. Thus its exclusion did not have a substantial effect on the outcome and any error in excluding it was harmless. Once again, I must disagree.

Under the Federal Rules of Evidence, an evidentiary error to which a party has raised a proper objection is not a grounds for reversal "unless a substantial right of the party is affected." Fed. R. Evid. 103(a); see also 28 U.S.C. § 2111; Fed. R. Civ. P. 61. An error is harmless, i.e., it does not affect a substantial right, only if "it is highly probable that the error did not contribute to the judgment." *Murray v. United of Omaha Life Ins. Co.*, 145 F.3d 143, 156 (3d Cir. 1998) (citing *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 923-27 (3d Cir. 1985)). Although, as discussed above,

the improper admission of evidence is usually harmless error in a bench trial, see supra Part II, the erroneous exclusion of evidence in a bench trial can be reversible error just as in a jury trial. See 11 Charles Alan Wright et al., Federal Practice & Procedure § 2885, at 454 (2d ed. 1995) ("In nonjury cases the district court can commit reversible error by excluding evidence but it is almost impossible for it to do so by admitting evidence." (footnote omitted)). Error is especially likely not to be harmless where the excluded expert was the only one a party offered to prove an essential element of its case.[17]

In this case, Dr. Gottheimer was the only expert witness plaintiffs offered to prove that Unisys acted imprudently. His proffered testimony, set forth in the margin, was strong.[18] By excluding Dr. Gottheimer's

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[17] See *Lauria*, 145 F.3d at 600 ("Finally, we note that because Slavin was the only witness originally offered to prove Amtrak's negligence with respect to the base tie, his exclusion from the trial did not constitute harmless error."); *Holbrook*, 80 F.3d at 787 (finding that the error in excluding plaintiff's two doctors who were his only evidence regarding the type of cancer from which he suffered was not harmless); see also *Habecker*, 893 F.2d at 53 (finding that the error in excluding one of plaintiff's two expert witnesses was not harmless where defendant proffered three experts on the same point).

[18] In particular, plaintiffs' attorney stated that, if he had been permitted to testify, Dr. Gottheimer's testimony would have been as follows:

> We have offered [Dr. Gottheimer's] testimony to establish . . . that in the insurance industry, there are some standard tools of tests that are performed in conducting an analysis of the financial condition of insurance companies, both life and health, and property and casualty, in terms of ratios that

testimony, the District Court deprived plaintiffs of their best evidence that Unisys breached its duty of prudence, a key element of their case. In light of our conclusion in Lauria and Holbrook, I cannot say that it is highly probable that the exclusion of Dr. Gottheimer did not affect the outcome of the trial. This is especially true in light of the other evidence admitted at trial, set forth in the margin.[19]

> are generated from the annual statement, tests prescribed by the National Association of Insurance Commissioners, and the Best leverage and liquidity and profitability ratios.
>
> The witness has performed these tests in his own capacity in the past. He has performed them with respect to Executive Life, based upon information that was available prior to the time of the three bids in question. He is able to interpret the tests. He is familiar with the tests. And his testimony would establish that the tests set up certain red flags that should have caused a person familiar with the tests and performing the tests to ask further questions about the solvency and the credit worthiness of Executive Life.

[19] The evidence on Unisys's prudence admitted at trial included primarily the testimony of White and Level, two Unisys executives charged with responsibility for the Funds, and Becker, an advisor whose services White and Level engaged. The evidence before the District Court concerned several questions which, although the court decided them in Unisys's favor, raised serious questions about Unisys's prudence. (1) Whether Unisys conducted an adequate independent investigation into Becker's recommendation? (2) Whether Unisys conducted an adequate investigation of its own after it ceased use of Becker's services? (3) Whether credit ratings were sufficient to prove that Unisys acted prudently? (4) Whether the Unisys trustees adequately considered and debated the advantages and disadvantages of the Executive Life

The District Court essentially decided all questions the evidence raised in favor of Unisys and concluded that Unisys acted prudently. Although I agree with the majority that, based on the admitted evidence, this conclusion was not clearly erroneous, this is to me an exceedingly close question. Accordingly, Dr. Gottheimer's testimony, if admitted, stood a good chance of changing this balance and consequently changing the decision of the District Court.

That the District Court had questions about Dr. Gottheimer's credibility should not affect our harmless error analysis. The District Court's conclusion that it would not have found Dr. Gottheimer's testimony credible, based only on his voir dire testimony, is not sufficient grounds for concluding that exclusion of his testimony was harmless. I believe that there is a reasonable chance that, if the District Court had given Dr. Gottheimer the opportunity to present his testimony in full, it would have found him to be a credible witness.

Our decisions in Lauria and Holbrook at least implicitly support this conclusion. In each of those cases, we reversed a district court decision excluding expert testimony on the grounds that the expert witness lacked the necessary qualifications. Such evidence goes to the weight, not the admissibility, of the expert testimony. See *Kannankeril,* 128 F.3d at 809. In neither Lauria nor

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GICs? (5) Whether the fact that the Executive Life GICs bore a higher interest rate was sufficient to suggest that they were not prudent investments? (6) Whether it was imprudent for Unisys not to maintain written investment guidelines?

Holbrook did the effect of the expert's particular qualifications on the weight properly accorded to his testimony play any part in our harmless error analysis. See *Lauria*, 145 F.3d at 600 (discussing harmless error without mentioning the quality of the improperly excluded expert's qualifications); *Holbrook*, 80 F.3d at 787 (same). Similarly, the impact of questions about Dr. Gottheimer's credibility on the weight due his testimony should not play a part in our harmless error analysis in this case.

I find further support for this conclusion in an examination of what the District Court identified as "impeachment" of Dr. Gottheimer. The District Court stated that "Dr. Gottheimer was impeached no fewer than four times on the relatively straight forward questions on his qualifications." 1997 WL 732473, at *26; see also 1997 WL 732473, at *21-*22. But this so-called "impeachment" involved at most minor inconsistencies. First, Dr. Gottheimer testified at trial that he could not recall having testified in court in a case involving a life insurance company, although he stated at his deposition three years earlier that twenty-four out of the twenty-five times he had testified in court involved property-casualty insurance companies. See 1997 WL 732473, at *21. Second, although at his deposition he could not recall having done consulting work involving life insurance company solvency, he testified that he had been retained once before his deposition and several times after his deposition to do such consulting. See 1997 WL 732473, at *21-*22. Third, while he testified at trial that there were "some differences and there are also some similarities in

the way" one analyzes life insurance as opposed to property-casualty insurance company solvency, in his deposition he agreed with Unisys's attorney that there were "fundamental differences." See 1997 WL 732473, at *22.

I cannot see how these answers, under any reasonable reading, suggest that Dr. Gottheimer is a completely incredible witness. At most, they suggest that he could remember some things at his deposition that he could not at trial, and vice versa. Certainly, Dr. Gottheimer's statements at trial were not directly inconsistent with those in his deposition. A comparison of the statements does not raise an inference that Dr. Gottheimer was being evasive, let alone lying. Thus, I cannot agree with the majority that the at worst minor inconsistencies in Dr. Gottheimer's testimony make it highly probable that his testimony would not have affected the District Court's judgment.

Accordingly, I do not think that the District Court's erroneous exclusion of Dr. Gottheimer's expert witness testimony was harmless. Therefore, I would remand this case for a new trial in which Dr. Gottheimer's testimony could be presented; hence, I dissent.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1007

IN RE: UNISYS SAVINGS PLAN LITIGATION

JOHN P. MEINHARDT, on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(E.D. PA. Civil No. 91-cv-03067)

BERNARD MCDEVITT, on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(E.D. PA. Civil No. 91-cv-03126)

PARKER C. KEAN, on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(E.D. PA. Civil No. 91-cv-03164)

MICHAEL HECK; JOSEPH MCCARTHY; ANGELO DEPIETRO, on behalf of themselves and all others similarly situated

v.

UNISYS CORPORATION; THE ADMINISTRATIVE COMMITTEE OF THE UNISYS SAVINGS PLAN; THE INVESTMENT COMMITTEE OF THE UNISYS SAVINGS PLAN; JACK A. BLAINE; JOHN J. LOUGHLIN; KENNETH MILLER; DAVID A. WHITE; STEFAN RIESENFELD

(E.D. PA. Civil No. 91-cv-03276)

GARY VALA, individually and on behalf of all others similarly situated

v.

JACK A. BLAINE; MICHAEL R. LOSEY; JOHN J. LOUGHLIN; KENNETH L. MILLER; STEFAN C. RIESENFELD; CURTIS A. HESSLER; DAVID A WHITE; UNISYS CORPORATION; THE NORTHERN TRUST COMPANY

(E.D. PA. Civil No. 91-cv-03278)

CAROLYN A. GOHLIKE, on behalf of herself and all others similarly situated

v.

UNISYS CORPORATION

(E.D. PA. Civil No. 91-cv-03321)

NADIA F. SOS; FAROUK M. SOS, individually and on behalf of all others similarly situated

v.

UNISYS CORPORATION

(E.D. PA. Civil No. 91-cv-03582)

KENNETH GOERS; JOHN J. CIESLICKI, on behalf of themselves and all others similarly situated

v.

UNISYS CORPORATION; THE NORTHERN TRUST COMPANY

(E.D. PA. Civil No. 91-cv-04678)

DENNIS C. STANGA; JAMES M. COLLINS, on behalf of themselves and all others similarly situated

v.

UNISYS CORPORATION
(E.D. PA. Civil No. 91-cv-04689)

JOHN H. BURGESS, JR., on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION
(E.D. PA. Civil No. 91-cv-04696)

WILLIAM TORKILDSON

v.

UNISYS CORPORATION
(E.D. PA. Civil No. 91-cv-04754)

John M. Meinhardt, Michael Heck, Joseph McCarthy, Angelo DiPietro, Gary Vala, Carolyn Gohlike, Dennis C. Stanga, James M. Collins, John H. Burgess, Jr., Bernard McDevitt, Parker Kean, Nadia F. Sos, Farouk M. Sos, Kenneth Goers, John J. Cieslicki, and William Torkildson, plaintiffs in the above-listed actions, individually and on behalf of the class certified by Order of the district court entered on January 28, 1992 in Master File Civil Action No. 91-3067,

Appellants

No. 98-1037

IN RE: UNISYS SAVINGS PLAN LITIGATION

JOHN P. MEINHARDT, on behalf of himself and all others similarly situated

v.

UNISYS CORPORATION

(E.D. PA. Civil No. 91-cv-03067)

HENRY ZYLLA; RICHARD SILVER; RONALD GRIPPO; EDWARD LAWLER; RICHARD ANDUJAR; CLARENCE MULLER; CHARLES WAHLER; JAMES MCLAUGHLIN; DONALD RADER; JOSEPH LAU; JAMES GANGALE; ALFRED CONTARINO; JOHN MARCUCCI; JOSEPH A. FIORE; RICHARD MASTRODOMENICO; NICK KLEMENZ; PETER SZCZYBEK, on behalf of themselves and all others similarly situated; ENGINEERS UNION LOCAL 444 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 445 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 450 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 470 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 165 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A.F.L.-C.I.O.

v.

UNISYS CORPORATION; EDWIN P. GILBERT; JOHN J. LOUGHLIN; THOMAS PENHALE, individually and in their capacities as members of the Unisys Employee Benefits Executive Committee and administrators of the Unisys Retirement Investment Plan; RICHARD H. BIERLY, EDWIN P. GILBERT; CURTIS A. HESSLER; LEON J. LEVEL; KENNETH L. MILLER; DAVID A. WHITE; JACK A. BLAINE; STEFAN C. RIESENFELD; GEORGE T. ROBSON, individually and in their

capacities as members of the Investment Committee of the Unisys Retirement Investment Plan

(E.D. PA. Civil No. 91-cv-03772)

Henry Zylla, Richard Silver, Ronald Grippo Edward Lawler, Richard Andujar, Clarence Muller, Charles Wahler, James McLaughlin, Donald Rader, Joseph Lau, James Gangale, Alfred Contarino, Richard Colby, John Marcucci, Joseph Fiore, Richard Mastrodomenico, Nick Klemenz and Peter Szczybek, plaintiffs in the above-listed actions, individually and on behalf of the class certified by Order of the district court entered on January 28, 1992 in Master File Civil Action No. 91-3067,

Appellants

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. No. 91-cv-03067)

Present: Becker, *Chief Judge*, Weis and Garth, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on September 25, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered November 24, 1997 and January 9, 1998, be, and the same are hereby affirmed. Each party

shall bear its own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: March 22, 1999

IN RE UNISYS SAVINGS PLAN LITIGATION; THIS DOCUMENT RELATES TO ALL ACTIONS

MASTER FILE NO. 91-3067

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1997 U.S. Dist. LEXIS 19198; 21 E.B.C. 2514

November 24, 1997, Decided

DISPOSITION: JUDGMENT entered in favor of all Defendants and against all Plaintiffs.

COUNSEL: For JOHN P. MEINHARDT, PLAINTIFF: DANIEL B. ALLANOFF, JOEL C. MEREDITH, MEREDITH & COHEN, ARTHUR M. KAPLAN, FINE, KAPLAN & BLACK, PHILA, PA USA.

For JOHN P. MEINHARDT, PLAINTIFF: VANCE K. OPPERMAN, OPPERMAN, HEINS & PAQUIN, PATRICIA A. BLOODGOOD, SCHATZ, PAQUIN, LOCKRIDGE, GRINDAL AND HOLSTEIN, RICHARD A. LOCKRIDGE, LOCKRIDGE GRINDAL NAUEN & HOLSTEIN P.L.L.P., MINNEAPOLIS, MN USA.

For JOHN P. MEINHARDT, PLAINTIFF: JULIAN R. BIRNBAUM, JAMES WASSERMAN, VLADECK, WALDMAN, ELIAS & ENGELHARD, P.C., NEW YORK, NY USA.

For JOHN P. MEINHARDT, PLAINTIFF: NICHOLAS E. CHIMICLES, JAMES R. MALONE, JR., C. OLIVER BURT, III, MICHAEL D. GOTTSCH, CHIMICLES, JACOBSEN & TIKELLIS, HAVERFORD, PA USA.

For UNISYS CORPORATION, DEFENDANT: LAURENCE SHIEKMAN, BRIAN T. ORTELERE, PEPPER, HAMILTON & SCHEETZ, PHILA, PA USA.

For UNISYS CORPORATION, DEFENDANT: JOSEPH A. TEKLITS, UNISYS CORPORATION, BLUE BELL, PA USA.

For THE PENNSYLVANIA LIFE AND HEALTH INSURANCE COMPANY GUARANTY ASSOCIATION, MOVANT: JANE L. DALTON, DUANE, MORRIS & HECKSCHER, PHILA, PA USA.

JUDGES: HERBERT J. HUTTON, J.

OPINION BY: HERBERT J. HUTTON

OPINION: FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGMENT

HUTTON, J.

November 24, 1997

Having considered all of the testimony and exhibits offered at trial, I now, pursuant to Fed.R.Civ.P. 52(a), make the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. This litigation involves Unisys' purchase of three Guaranteed Investment Contracts ("GICs") from the Executive Life Insurance Company of California ("Executive Life"), for its retirement savings plans. The purchase of the three GICs totaled some $ 217 million.

Guaranteed investment contracts are backed only by the credit worthiness of the insurance company offering them. In other words, GICs are nothing more than the unsecured credit of insurance companies. GICs became popular in the mid-1980s among corporate employees who opted for GICs in their pension plans because equity investment was considered too risky for the investment of retirement money. GICs usually mature within two to eight years and pay a fixed interest rate by investing in higher yielding assets such as junk bonds and speculative real estate. Guaranteed Investment Contracts are like bank certificates of deposit, promising a certain return often 0.5 to 1.5 percentage points above yields on money-market mutual funds – for a fixed period.

The GIC "guarantee" is limited to the return an investor is promised but not the safety of the principal. The U.S. government does not back GICs the way it backs federally insured bank deposits. By 1990, nearly two-thirds of every dollar in 401(k) plans – in excess of $ 100 billion – was in guaranteed investment companies which invested in assets that paid higher returns than Treasury Securities. Once again, money in a GIC is only as safe as the financial strength of the insurance company.

At issue in this litigation is Unisys' purchase of three Executive Life GICs. The Executive Life GICs were bought for the former Sperry Fixed Income Fund on June 9 and December 2, 1987, and for the Unisys Insurance Contract Fund on January 13, 1988.

2. On April 11, 1991, the California Insurance Commissioner placed Executive Life into conservatorship and temporarily froze all payments on the GICs issued by

Executive Life, including those held by certain investment funds of the Unisys Savings Plan, the Unisys Retirement Investment Plan, and the Unisys Retirement Investment Plan II (collectively referred to as the "Plan" or the "Savings Plan"). *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 431 (3d Cir.), cert. denied, 136 L. Ed. 2d 19, 117 S. Ct. 56 (1996) ("*Unisys*").[1]

3. Plaintiffs thereafter filed 12 putative class action lawsuits which were later consolidated in this Court. On January 26, 1995, this Court granted summary judgment on all of the claims, except those arising under the Labor Management Relations Act ("LMRA"). *In re Unisys Sav. Plan Litig.*, 1995 U.S. Dist. LEXIS 843, No. CIV.A. 91-3067, 1995 WL 19048 (E.D. Pa. January 26, 1995). The Third Circuit reversed this Court's grant of summary judgment to Unisys, and remanded this case for trial.

4. Although this Court did not grant Unisys summary judgment on the LMRA claims, those issues have been severed from the trial of this matter. (See Order of September 18, 1996).

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[1] The three plans each provide their respective participants with the opportunity to direct their monies into the same investment options and are jointly administered. As more fully described below, the Unisys Retirement Investment Plan (the "RIP") and the Unisys Retirement Investment Plan II (the "RIP II") provide precisely the same benefits to certain unionized participants. Cf. *Unisys*, 74 F.3d at 426-27 ("In addition to the Unisys Savings Plan, Unisys established the Unisys Retirement Investment Plan ("RIP") and the Unisys Retirement Investment Plan II ("RIP II") for unionized employees, which for all intents and purposes were identical to the "Unisys Savings Plan.").

5. The Savings Plan is a participant-directed, defined contribution plan under ERISA section 3(34), 29 U.S.C. § 1002 (34). Because of the preferential tax treatment given participant contributions to their individual accounts under Internal Revenue Code Section 401(k), such retirement plans are commonly referred to as "401(k) plans."

6. These plans must be distinguished from defined benefit plans where participants are typically promised, upon retirement, a benefit in the form of a fixed percentage of their pre-retirement salary. (See Tr. of 6/10/97 at 141-42; see also 29 U.S.C. § 1002(35)). Unisys employees also participate in a defined benefit pension plan, the Unisys Pension Plan. (See Unisys Ex. 1884).

7. During the relevant time period, the Unisys Saving Plan offered six different investment options into which participants could, in five percent increments, direct their contributions. The six funds were: (1) the Unisys Common Stock Fund; (2) the Short Term Investment Fund (the "STIF"); (3) the Indexed Equity Fund; (4) the Active Equity Fund; (5) the Diversified Fund; and (6) the Insurance Contract Fund ("ICF"). (Unisys Ex. 1884 at 75). Participation in the Plan was voluntary and, insofar as new contributions were concerned, there were no restrictions on how participants could direct these investments. (See Tr. of 6/9/97 at 176); (*Unisys*, 74 F.3d at 447) ("We agree with Unisys that the evidence is uncontroverted that for all intents and purposes, a participant's ability to make initial contributions to the Plans' various investment funds were unfettered.").

8. The Unisys Plan also included the Fixed Income Fund or "FIF," a fund formerly included in the old Sperry 401(k) plan, Sperry Retirement Plan Part B, and subsequently closed to new contributions. (See Unisys Ex. 1886 at 10). The Unisys Savings Plan emerged from the merger of the Sperry Plan and the Burroughs Employees Savings Thrift Plan (the "B.E.S.T."). (See Tr. of 6/9/97 at 155). Following the merger of these two plans, the Sperry FIF ceased to accept new contributions; proceeds from maturing contracts and all participant-directed contributions and transfers were reinvested in the ICF. (See Tr. of 6/9/97 at 44-45; Tr. of 6/17/97 at 20, 94). For all purposes, the two funds worked together as one. (See Tr. of 6/17/97 at 94).

9. These six diverse investment options provided a variety of investment choices ranging from the more aggressive Active Equity Fund, which sought to "outperform the general stock market," to the Short-Term Investment Fund ("STIF"), which tracked lower yielding short-term market rates by investing in "U.S. Government and Federal Agency notes, U.S. Treasury Bills, bank obligations" and other short term investments. (See Unisys Ex. 1884 at 75).

10. The Plan allowed individual participants to decide which investment options to pursue, how much money to invest in total and how much money to place in each fund. As the Summary Plan Description ("SPD") explains, "you direct how your before-tax contributions are invested. You can choose from six funds, each with a different investment objective, level of risk and investment return." (See Unisys Ex. 1884 at 74). As class representative McCarthy similarly admitted, his investment

decisions were "personal" to him. (See Tr. of 6/23/97 at 70).

11. Plaintiffs could also transfer their money between the funds. (See Unisys Ex. 1884 at 80). Participants seeking to transfer their money from FIF and/or CIF to the STIF had to place their money in one of the equity funds for twelve months, the so-called "equity wash" provision. This requirement permitted the insurance carriers, the issuers of the GICs, to predict better their cash flows, prevented the participants from engaging in interest rate arbitrage and, therefore, led to higher rates of interest paid on the GICs. (See Tr. of 6/9/97 at 160-61, 177-78, 180; see also Tr. of 6/10/97 at 50).

12. Moreover, both retired Unisys personnel and former Unisys employees were free to move their money out of the Unisys Plan.

13. At issue in this litigation is Unisys' purchase of three Executive Life GICs for the FIF and ICF at a time when Executive Life held the highest available ratings from two well-regarded rating services, Standard & Poor's and A.M. Best. (See Pls.' Ex. 9 at 2). These services gave Executive Life ratings of AAA and A+ respectively for its claims-paying ability. Moreover, at the time of these purchases, Executive Life had an A3 rating from Moody's, an "investment grade" rating. (See Tr. of 6/11/97 at 146). In any event, on August 12, 1988, Moody's upgraded its rating of Executive Life from A3 to A1. (Tr. of 6/10/97 at 176; Unisys Ex. 1128; see also Tr. of 6/10/97 at 8).

14. The Executive Life GICs were bought for the former Sperry FIF on June 9 and December 2, 1987, and

for the Unisys ICF on January 13, 1988. Executive Life, however, was only one of many issuers from which Unisys had purchased GICs for the Plan.

15. After the purchase of the third Executive Life GIC in 1988, the GICs totaled some $ 217 million. (See Unisys Ex. 2674). The three Executive Life contracts then constituted about 20% of the combined assets of the FIF and ICF. On the seizure date in 1991, however, Executive Life totaled only about 15.5% to 15.3% of the combined FIF and ICF. Id.

16. The Plan specifically delegated to the Investment Committee the discretionary authority "to direct the Trustee with respect to the investment of the assets of the Plan and to make any decision respecting assets of the Plan." (See Unisys Ex. 2748 at 71). The authority to make the purchases at issue in this case, however, were [sic] delegated to Leon Level, then Unisys' vice president and treasurer, and David White, then Unisys' director of capital management and trust investments. (See Tr. of 6/11/97 at 24-27). Both Mr. Level and Mr. White testified to their experience in finance and investing, and I find that both had the education, experience and expertise needed to make these investment decisions.

17. Mr. Level graduated from the University of Michigan with an undergraduate and a masters degree in business. (See Tr. of 6/11/97 at 74). After completing his academic studies, Mr. Level went to the accounting firm then known as Haskins and Sells. He is a CPA. After leaving Haskins and Sells, Mr. Level spent ten years in corporate controllership activities at Bendix Corporation.

He joined Burroughs Corporation in 1981 as vice president of financial planning. He was elected treasurer of Burroughs in 1982, and was then, following the merger of Burroughs and Unisys, named treasurer of Unisys. His duties at Burroughs and Unisys included management of the captive finance subsidiary, and he was responsible for the supervision of the domesticttreasury [sic] and the international treasury operations. He oversaw the trust investments at both Burroughs and Unisys.

18. Mr. White holds a bachelor's degree from the University of Michigan in economics and mathematics, and has an MBA from the University of Michigan in operations research and finance. (See Tr. of 6/17/97 at 149-50). He worked at Burroughs as a financial analyst in international manufacturing, and was the company secretary for Burroughs' British subsidiary. Additionally, he served as finance director for Burroughs' international group for Europe, and then worked with the corporate strategic planning staff. In 1982, he was appointed Burroughs' director of capital management and trust investments. In that capacity, Mr. White was charged with oversight of Burroughs' defined benefit pension plan, then some $ 350 million in assets. At the time of the Unisys-Burroughs merger, Mr. White's efforts led to the growth of these funds to approximately $ 800 million. Mr. White was similarly responsible for Burroughs' Employees Savings Thrift Fund, or BEST Plan, a 401(k) savings plan. Mr. White explained the steps he and his staff took to prepare and educate themselves prior to the implementation of the BEST Plan. He also explained his expertise with various complex investments, including derivatives and futures arbitrage. Id. At 160.

19. Each of the GICs purchased from Executive Life was selected pursuant to a competitive bidding process, among qualified bidders. Competitive bidding insured the highest rates from the competing insurance companies. (See Tr. of 6/10/97 at 140; Tr. of 6/17/97 at 167).

20. The first bid was held on June 9, 1987, under the auspices of a recognized GIC specialist, Murray Becker. Mr. Becker spent much of his career assisting plan sponsors in purchasing GICs for defined contribution pension plans (having handled more then 500 bids). (See Tr. of 6/10/97 at 139). Moreover, Mr. Becker has a degree from the Wharton School of the University of Pennsylvania, was an enrolled actuary, and spent the entirety of his career in the insurance industry (or acting as a GIC specialist). I find that Mr. Becker was qualified to serve as an expert consultant to Unisys on the bid selection process on June 9, 1987.

Becker and his staff mailed bid specifications on behalf of Unisys to more than thirty companies on Becker's list of approved bidders in April, 1987. (See Tr. of 6/10/97 at 156; Unisys Ex. 1068).[2] Becker invited representatives of the bidding companies to make in-person presentations and to answer questions concerning the bids and their companies. (See Tr. of 6/10/97 at 117-18).

21. Murray Becker primarily relied upon the Standard & Poor's rating to determine the creditworthiness and suitability of an insurance company for inclusion in

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[2] Unisys reviewed Becker's bid specifications and provided historical cash flow data prior to the June 9, 1987 bid. (See Unisys Ex. 1069; Tr. of 6/18/97 at 67-68).

the Johnson & Higgins' universe of approved bidders. Furthermore, Mr. Becker explained the confidence that he and other professionals in the industry had in Standard & Poor's, stating that the advent of the Standard & Poor's rating afforded GIC purchasers the tools needed to access properly the creditworthiness of insurance companies:

> Q: Could you describe for the Court the – what you said to the Society of Actuaries back in '87 about the advent of Standard and Poor's in the credit rating business?
>
> A: Well, it was a welcomed development, because prior to the advent of Standard and Poor's, we were trying to set a triple-A standard without having the ammunition to do it. So we were saying to our clients, we believe that the leading insurance companies are probably triple-A credits, and that there are probably plenty of triple-A credits, and you should try to find insurance companies that somehow or other, if Poor's, or Moody's, or any of the recognized credit rating agencies, that agency would develop a triple-A rating. But in the absence of the rating service, there was really no satisfactory way to make the determination.
>
> So when Standard and Poor's went into the business of rating insurance companies for their claims paying ability, it filled a void, and we viewed it as a very fortuitous event.

(Tr. of 6/10/97 at 149-50).

Mr. Becker also explained the multitude of analyses performed by Standard and Poor's before issuing a rating of an insurance company. These tests included: industry

risk; earnings performance; capitalization; liquidity; management; asset mix; diversification; interest rate risk management and liquidity risk. (See Tr. of 6/10/97 at 160-64). Furthermore, Standard & Poor's interviewed the management of the insurance companies then being rated to gain further insights into the creditworthiness issue. The extent to which the ratings services afforded subscribers reliable information was further explained by Messrs. Level and White. Both Level and White explained the standing that the ratings services enjoy in the investment/finance community, based on their personal observations on the competence and thoroughness of these services. (See, Tr. of 6/17/97 at 173-74; Tr. of 6/11/97 at 89-93, 131, 137-40).

22. Mr. Becker also testified that while Executive Life had an "aura of controversy" stemming from the fact that Executive Life had a relatively high concentration of high yield bonds in its investment portfolio compared to other insurance companies, (see Tr. of 6/10/97 at 108), he believed that the controversy posed no added default risk for GIC purchasers. In other words, the inclusions of such bonds in the Executive Life portfolio did not make the selection of the GIC imprudent. In that regard, I note the evidence at trial that all insurance companies had high yield bonds in their investment portfolios. (See Tr. of 6/11/97 at 108).

23. Mr. Becker also explained that Standard and Poor's, on a number of occasions, reaffirmed its AAA rating to meet questions regarding the appropriateness of assigning such a rating to an insurer having high yield bonds in its investment portfolio (and in the face of

regulatory actions taken by insurance officials in New York). (See Tr. of 6/10/97 at 159-60, 165-66).

24. As an insurance company then having an AAA rating from Standard and Poor's, the rating service opined that Executive Life would likely satisfy its obligations:

> Insurers rated triple A offer superior financial security on both an absolute and relative basis. They possess the highest safety and have an overwhelming capacity to meet policyholder obligations.

(See Tr. of.6/10/97 at 154; Unisys Ex. 2116).[3] A.M. Best also gave Executive Life its highest rating, A+. (See Pls.' Ex. 9 at 2).[4]

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[3] The bid materials also contained a list of other Executive Life GIC purchasers, including well known plan sponsors such as Xerox, National Can Company, Reynolds Metals, Hammermill Paper Company, American Honda Motor Company, Pacific Lumber, Champion Spark Plug, Blue Cross of California and the states of Alaska, Maryland, Michigan and Washington. (See Pls.' Ex. 9 at 13).

[4] The A.M. Best A+ rating similarly described Executive Life's prospects:

> Assigned to those companies which in our opinion have achieved superior overall performance when compared to the norms of the life/health insurance industry. A+ (Superior) rated insurers generally have demonstrated the strongest ability to meet their respective policyholder and other contractual obligations.

(See Unisys Ex. 1450).

25. Mr. White further explained that the decision to purchase the Executive Life contracts followed consideration of Executive Life's "barbell" investment strategy (using other investments, including a high percentage of government bonds, to offset the risks of junk bonds in the portfolio), (see Tr. of 6/17/97 at 170), the fact that Executive Life included no real estate mortgages or derivatives in its portfolio, and that Executive Life had a relatively low proportion of commercial real estate. White further explained that an investment in Executive Life posed no problem of an asset-liability "mismatch." Moreover, Unisys also considered the rates that the bidders were offering, mindful of the fact higher rates could, over time, yield dramatic differences in the amount of money available at retirement.[5] Nevertheless, although Unisys sought high returns for participants, the fiduciaries were constrained by their standards of risk tolerance. (See Tr. of 6/18/97 at 50).

26. White also explained the other considerations animating the decision to purchase contracts from Executive Life, including the maturity of the contracts (to achieve a proper "laddering" of the investment portfolio) and that Executive Life's bond portfolio was balanced against the portfolios of the other issuers in the Plan. (See Tr. of 6/11/97 at 87, 121). In that manner, Unisys sought to diversify the FIF and ICF portfolios by insuring that the asset holdings of the various insurance companies,

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[5] See Tr. of 6/17/97 at 157 ("In other words, for typical 20 year career, an extra 20 basis points of return becomes quite significant in the long term as to the value of the retirement accounts"). See also Tr. of 6/11/97 at 98.

many of which were then steeped in real estate, were diversified against one another. (See Tr. of 6/17/97 at 171).

27. White also testified that in his capacity as manager of the Burroughs and Unisys defined benefit pension plans, he had carefully considered the use of high yield bonds in pension investing and knew well the risks involved. (See Tr. of 6/17/97 at 53-54). White further explained the prevailing view at the time: that a diversified portfolio of high yield bonds promised a relatively high rate of return, with relatively low risk of default. (See Tr. of 6/17/97 at 53, 172; see also Tr. of 6/17/97 at 204) ("Well, it was high yield bonds and I think academic research has shown that the high yield bonds are safer, return more on a risk adjusted basis than treasuries.").

28. The Court of Appeals directed this Court to make further inquiry, at trial, into whether Unisys breached its fiduciary duties by purchasing Executive Life GICs despite the fact that its expert consultant, Murray Becker, believed that Executive Life could not sustain its AAA rating from Standard & Poor's, if the holdings of high yield bonds exceeded 35 percent of the issuer's investment portfolio. See *Unisys*, 74 F.3d at 427. At trial, Mr. Becker testified that he made no such statement and held no such belief. (See Tr. of 6/10/97 at 118, 128). In sum, there can be no finding that the purchase of the Executive Life GIC that day violated any of Mr. Becker's standards, one of the factual issues to be resolved on remand from the Court of Appeals. *Unisys*, 74 F.3d at 427. Becker specifically testified that he relied on Standard & Poor's, not the representations made by the Executive Life representative. (See Tr. of 6/10/97 at 119).

29. Stated differently, the inclusion of junk bonds in the Executive Life portfolio did not, in Becker's view, present a higher default risk regardless of the maturity of the GICs. (See Tr. of 6/10/97 at 126-29). Moreover, Becker believed that fiduciaries had no credible basis to challenge the AAA rating of Standard & Poor's. (See Tr. of 6/10/97 at 113).

30. Further, the Court of Appeals instructed this Court to determine whether, in fact, Unisys selected the GIC despite Mr. Becker's recommendation that a shorter maturity was appropriate. *Unisys*, 74 F.3d at 427. Mr. Becker specifically testified that he did not recommend a shorter maturity because Executive Life was not the highest bidder at the shorter maturities. (See Tr. of 6/10/97 at 172-75). He further testified that he and David White had only a general, philosophical discussion about maturities. In other words, the discussion regarding contract maturities did not relate to the decision whether to select a five year Executive Life GIC in June, 1987.

31. After the June 9, 1987 bid, the professional managers at Unisys replaced Mr. Becker, believing that they could now do an equally competent job at selecting GIC issuers for the FIF and ICF. (See Tr. of 6/17/97 at 176-77; Tr. of 6/10/97 at 96; and Tr. of 6/11/97 at 37). Moreover, by replacing Mr. Becker with the inhouse personnel at Unisys, the professional managers saved the Plan participants approximately $ 25,000 per bid. (See Tr. of 6/17/97 at 177-78).

32. Unisys employees then assumed the responsibility for the compilation of the list of potential bidders. Unisys sought to broaden the list of bidders to maximize

the amount of market information then available to the decision-makers. (See Tr. of 6/17/97 at 69-70).

33. Between bids, Unisys engaged in an ongoing process of reviewing and updating the information on potential bidders. As Mr. Level explained:

> A: The selection process was done in part on bid day, but the selection process occurred over – over the entire period we had a fund. We reviewed potential candidates to bid, we reviewed the portfolio and the types of maturities and insurance companies that we sought to include in the portfolio. There was a clear understanding prior to bid day to what maturities and what insurance companies would qualify and the like.

(See Tr. of 6/11/97 at 46).[6] Mr. White also analyzed the portfolio of the insurance carriers. (See Tr. of 6/11/97 at 54). The risk of the bidders was also evaluated.

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[6] Mr. Level also explained the other steps taken prior to bid day:

> Certainly we had minimum rating standards for the three principal [ratings] agencies that rated this type of situation. We reviewed current publications, technical magazines and articles, and we reviewed materials submitted by the carriers concerning – their companies in – into our facilities and interviewed management, and reviewed their strategies. One specific occasion, I recall personally visiting one of the insurance carriers that bid on one of the funds, and meeting with the senior management – of that carrier.

(See Tr. of 6/11/97 at 48).

34. Unisys also sought guidance from an advisory firm to its defined benefit pension plan. Unisys would, "as a matter of course," meet with executives of bidders and winners of bids, to further assess their suitability for inclusion in the Plan.

35. Moreover, as Mr. White testified, Unisys relied on the ratings of Standard & Poor's, A.M. Best and Moody's in evaluating the creditworthiness of the issuers, (see Tr. of 6/17/97 at 105; Tr. of 6/11/97 at 89), and sought to purchase only AAA ratings for the Plan. Id. ("We wanted A plus, triple-A, when we would get it, everything being equal, etc."). Unisys also had available SEC forms 10K and 10Q and the issuers' annual reports to review prior to the selection of a GIC. (See Tr. of 6/17/97 at 80-81; see also Tr. of 6/11/97 at 62). The A.M. Best rating was a source of information on the asset composition of the bidding insurance companies. (See Tr. of 6/17/97 at 71).

36. On December 2, 1987, pursuant to a second competitive bidding conducted by Unisys, an Executive Life contract was one of three purchased for the FIF. Thereafter, on January 13, 1988, Unisys purchased another such GIC, this time pursuant to a competitive bidding held for the new ICF. Executive Life enjoyed the AAA rating from Standard & Poor's through all of the relevant bids. *Unisys*, 74 F.3d at 427-28.

37. Although Moody's initially assigned Executive Life an A3 rating, while still an "investment grade" rating, that fact is of no compensation.[7] Moody's later, on August 12, 1988, upgraded Executive Life from A3 to A1. Mr. Level explained, "to move two steps in rating is a very, very meaningful and positive, in this case, conclusion." (See Tr. of 6/11/97 at 146). Executive Life was not selected at subsequent bids, however, due to diversification concerns. (See Tr. of 6/10/97 at 9).

38. Unisys' Plan participants had information to make informed choices regarding their investments. In 1988, every Plan participant was notified, through the new prospectus which accompanied the adoption of the new Unisys Plan, that Executive Life GICs had been purchased for the FIF and ICF.[8] The 1988 prospectus also informed the Plan participants of the risks associated with their election to invest in GICs:

> The fund is invested contracts with insurance companies and other financial institutions which guarantee repayment of principal with interest at a fixed or fixed minimum rate for

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[7] An "investment grade" rating, as the name suggests, is an investment of sufficient quality to meet ERISA's fiduciary standards. See *Glennie v. Abitibi-Price Corp.*, 912 F. Supp. 993, 1002 (W.D. Mich. 1996) ("a fiduciary of a plan would almost certainly violate the fiduciary duty if the fiduciary caused the plan to purchase a GIC in an insurance company with ratings below investment grade.").

[8] Class representative Henry Zylla acknowledged that the prospectus informed him that Executive Life was in the Plan, which, in turn, prompted him to complain of these investments (with their use of high yield bonds) to Unisys.

> specified periods of up to ten years. The Company [Unisys] does not guarantee the repayment of principal or interest.

(Defs'. Ex. 2109 at 9) (emphasis added).

39. Consistent with Unisys' disclosures on the topic, class representative McCarthy specifically admitted that he understood that the insurance company issuing the GICs, and not Unisys, was alone obligated to make the promised payments under the contract. (Tr. of 6/23/97 at 66-67).

40. The SPD also explained to participants that they assumed the risk of loss for their investments:

> Benefits available are based on your savings plan value at the time of distribution. Your payments from the Plan are subject to the performance of the funds in which your accounts are invested. If the value declines, you may receive less from the Plan than you and the Company contributed.

(emphasis added). This explanatory language was repeated in the SPDs for the RIP and RIP II Plans.

41. The SPD also told participants that the "investment objective" for the Insurance Contract Fund was to "preserve the amount invested while earning interest income. . . . " (Defs.' Ex. 1884 at 75). In that regard, the plaintiffs similarly described the Plan's objectives in

terms of how the funds would perform, rather than looking to the returns on the individual GICs themselves. (Tr. of 6/18/97 at 141; Tr. of 6/12/97 at 35).[9]

42. Some two years after the final Executive Life GIC purchase, in January of 1990, Executive Life announced a write-down of its high yield bond portfolio which, in turn, resulted in its downgrading by the major ratings services. (Tr. of 6/9/97 at 73-74).

43. Upon learning of the write-down in the Executive Life portfolio, representatives of Unisys met with officials from Executive Life to gain insight into the situation at the insurer. (Tr. of 6/9/97 at 74). More specifically, Mr. White and others from Unisys explored whether additional write-downs to the Executive Life portfolio were likely, and whether additional policy surrenders would force a liquidity crisis or cause the insurer to default. (Tr. of 6/10/97 at 10-12). Present on behalf of Executive Life were Betsy Niemeyer, Garland Wilson and Alan Chapman, senior vice president of Executive Life, who participated by phone. Based on that meeting, Mr. White circulated a memorandum to Unisys' management concluding that Executive Life would likely survive the crisis.

44. The Pension Investment Committee met on February 5, 1990. The Committee members debated the various considerations surrounding the Executive Life

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[9] Plaintiffs' damages expert, Dr. Tsetsekos, also admitted that the participants could not choose to invest in any one GIC; rather, they were constrained to invest their money into the Funds. (Tr. of 6/16/97 at 54).

situation, including the fiduciaries' obligation to disclose appropriate information to participants. The members of the Committee agreed that the need for additional disclosures had to be balanced against the fact that fiduciaries could not give investment advice to participants and, in so doing, potentially assume additional fiduciary liability. (Tr. of 6/9/97 at 111, 126). A determination was then made to take a two step approach to communicating with Plan participants. First, a series of "Q's" and "A's" were published in BENINFO, an internal Unisys electronic communications tool. Moreover, a letter from the chairman of Executive Life, Fred Carr, would be re-sent to the participants through the BENINFO system.[10] Second, the company would send to participants a cover letter along with the new 1990 Prospectus.

45. The company representatives then decided that these questions and answers should be circulated through BENINFO, to make certain that human resource personnel, skilled in dealing with participant inquiries, would soon have this information available to them. (Tr. of 6/11/97 at 183-84, 192). Moreover, a cover letter, accompanying the new prospectus and giving further details of the Executive Life situation, would highlight the issue for the benefit of the participants.

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[10] The Department of Labor Regulations requires fiduciaries to publish this type of information to savings plan participants. 57 Fed. Reg. 46910 ("In this connection, it should be noted that, to the extent that copies of prospectuses, financial statements and reports, or similar materials relating to the investment alternatives available under the plan, are furnished to the plan, such information would be required to be made available to the participant. . . . ").

46. Aside from providing information to its field benefits administrators and responding to individual participant letters and meeting with union representatives, Unisys sent the new prospectus to every participant in March of 1990. (See Defs.' Exs. 2126, 2127, 1886, 1887).

47. That prospectus was accompanied by a letter from Jack A. Blaine, vice president, human resources. Mr. Blaine's letter stated, in part:

> The decisions you make with respect to which investment fund or funds are appropriate for you and how much to invest in any one fund are particularly personal to you. Neither Unisys nor any Plan representative can advise you as to which investment strategy is appropriate for your situation. So we urge you to carefully review your Plan prospectus, particularly the description of the investment funds.
>
> We also would like to respond to a number of questions that have arisen with respect to recent news events concerning the troubled "junk bond" market and the effect, if any, that such problems may have on the Insurance Contract Fund, Fixed Income Fund (formerly available at Sperry Retirement Program – Part B Participants) and the Guaranteed Investment Contract Fund (formerly available to Burroughs Employees' Savings Thrift Plan Participants). You should be aware of the following points, which are described in your Plan prospectus:
>
> * * *
>
> The repayment of principal and interest necessarily depends totally on the ability of the insurance company or financial institution backing

> the obligation under the investment contract to repay such amounts when due.
>
> Unisys does not guarantee the repayment of principal or interest under any investment contract.
>
> The financial stability of each of the insurance companies and other financial institutions depends on the success of its own investment portfolio and a downturn or loss in one or more areas of the investment portfolio, such as an investment in "junk bonds," could have an adverse effect on the stability of the financial institution.
>
> Please review carefully your copy of the updated Prospectus, since it provides the most up-to-date description of the Plan and your investment options.

(Defs.' Ex. 1887) (emphasis added).

48. Attached to Mr. Blaine's letter was a two-page chart showing that, as of January 2, 1990, the FIF held more than $ 161 million worth of Executive Life GICs and that the ICF held one Executive Life GIC worth more than $ 47 million. In addition, the chart showed the value of other contracts and the rating of each issuer on the date of purchase and its rating as of March 20, 1990. As the chart shows, Executive Life had been downgraded from AAA to A by Standard & Poor's; from A1 to Ba2 by Moody's; and from A+ to A by A.M. Best.

49. The accompanying 1990 Prospectus, which participants were admonished to read carefully, reiterated the cautions set out in Mr. Blaine's letter. Specifically,

under the heading "investment options" the 1990 Unisys Savings Plan, RIP and RIP II Prospectuses stated:

> An investment in any of the investment funds involves some degree of risk. Many factors, including market changes, interest rate fluctuations, the financial stability of the institutions in which plan assets are invested, the quality of the investment portfolios of these institutions, and other economic developments, will affect the performance of the invest funds and the value of a member's investments in those funds. As a result, there is no assurance that at any point in time the value of an investment in any fund will not be lower than the original amount invested.[11]

(Defs.' Ex. 1886 at 7).

50. After the transmission of the new prospectus with the accompanying cautionary letter, Unisys noted an increase in participant transfer out of the FIF and ICF. (Tr. of 6/10/97 at 44-47).

51. Unisys provided this cautionary language in the letter to its participants a full year before the seizure of Executive Life. Unisys also maintained contact with representatives of Executive Life through the relevant time period.

52. The plaintiffs tendered class representative Henry Zylla in support of their claim that Unisys had

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[11] In the descriptions of both the ICF and the FIF, the 1990 Prospectuses repeat that the repayment of principal is necessarily dependent upon a GIC issuer's ability to pay such amounts and that this ability is, in turn, dependent upon the financial stability of the GIC issuer. (Defs.' Ex. 2126 at 8, Ex. 2127 at 6).

failed to disclose adequate information regarding the Executive Life contracts and/or lulled the participants into not transferring their money out of the FIF and ICF prior to the April 11, 1991 conservatorship.

The class representatives admitted at trial that they put their money into equities both before and after the conservatorship. Thus, the plaintiffs [sic] have moved their money and avoided the temporary freezing of their assets.[12] Although the plaintiffs have asserted that the class members are uniformly conservative in their investments, Mr. Zylla admitted that such generalization about investment preferences cannot be made. (See Tr. of 6/18/97 at 150; Tr. of 6/11/97 at 27-28).

53. During the relevant time period, Mr. Zylla amassed a substantial amount of information regarding Executive Life, wholly separate and apart from the disclosures made by Unisys. Despite his admissions that the public information he gathered was not comforting, he took no further action to transfer his funds prior to the imposition of the conservatorship. Having found that Unisys took no steps to lull him into inaction, I do not find credible his claim that he justifiably ignored these public disclosures on the status of his investments. In fact, his claims are belied entirely by the admissions of

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[12] Class representative Zylla admitted that despite his claim that the plaintiffs would never purchase such investments, he spread the money returned to him from the Executive Life conservatorship across three of the Plan's stock funds. (See Tr. of 6/19/97 at 24-25). Similarly, class representative Kean also admitted to putting his Executive Life money into stocks. (See Tr. of 6/12/97 at 62-63.

his co-class representative, Richard Silver, that Messrs. Silver and Zylla affirmatively warned other participants to transfer out of Executive Life before the April 11, 1991 conservatorship.

54. Mr. Zylla admitted that he knew that Executive Life was included in the Savings Plan as early as February of 1988, and that Executive Life's portfolio included high yield bonds. (See Tr. of 6/18/97 at 82). By letter dated March 4, 1988, Mr. Zylla complained to Unisys regarding the inclusion of Executive Life in the Savings Plan Portfolio. On that date, Zylla wrote to Richard Barley of Unisys, specifically voicing his concerns:

> Members of the Engineers Union, Local 444 IUE are among those employees scheduled to be included in the Unisys Retirement Investment Plan to be effective April 1, 1988. The Appendix to the Prospectus for the Plan states that during the April 1st to June 30th period, funds directed into the Insurance Contract Fund are to be invested exclusively with Executive Life Insurance Company. Executive Life is known to specialize in acquiring and dealing in high risk "junk bonds."
>
> The Fixed Fund, the predecessor to the Insurance Contract Fund, has historically been selected by those who seek safety of principal with a reasonable rate of return and the Engineers Union believes that this proposed Corporation action will subject many employees to a degree of risk which they may be unprepared to accept. In view of this, the Engineers Union urges you to diversify Insurance Contract Funds among insurance companies less inclined to engage in high risk investments.

(Pls.' Ex. 110) (emphasis added). Despite this specific awareness of the selection of Executive Life and the

stated concern about junk bonds in the Executive Life investment portfolio, the first complaint in this matter was not filed until more than three years after Mr. Zylla drafted this letter, on May 9, 1991.

55. Mr. Zylla testified to a March 5, 1990 meeting with Unisys representatives, after the write down of the Executive Life portfolio, wherein, it is asserted, he was reassured about the status of his investments such that he took no action in the following eleven months (notwithstanding the massive amounts of information Mr. Zylla compiled about Executive Life, described below). (See Tr. of 6/18/97 at 104-108).[13]

56. Mr. Zylla further testified that at that meeting, Charles Service of Unisys referred to Murray Becker as a "phoney," although the contemporaneous notes Mr. Zylla relied upon in recalling the events of that meeting include no such language. (Tr. of 6/19/97 at 6-7).[14] Again, given the contradictory nature of Mr. Zylla's testimony on the circumstances of that day, I find the evidence insufficient to support his contention that he was comforted or assured by Unisys regarding the status of his Executive Life investments.

57. Mr. Zylla described for the Court the contents of a file he created, comprised of newspaper clippings and

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[13] Mr. Zylla requested that meeting with Unisys representatives. (See Tr. of 6/10/97 at 23)

[14] Although class representative Richard Silver also attending this meeting, he did not testify that Mr. Service called Mr. Becker a "phoney." (See Tr. of 6/23/97 at 97-99).

Executive Life materials (notably press releases and correspondence to Executive Life agents), that were collected by Mr. Zylla or passed along to him by other participants. (See Tr. of 6/18/97 at 156-57, 178-79). He also explained the varied disclosures Unisys made to him about the status of the Executive Life investments.

58. More specifically, on February 19, 1990, Unisys told Mr. Zylla of the downgrade by Moody's and that Executive Life's ability to meet its obligations was "moderate." Zylla admitted that this communication was not "comforting."

59. On March 11, 1990, Zylla read in the New York Daily News that:

> To be sure, the troubles facing the Executive Life Insurance Co. of New York, and its parent company, First Executive Corp. of Los Angeles, have been fodder for the financial pages. Both companies were tied to the junk bond factory at Drexel Burnham Lambert Inc. and invested heavily in high-risk junk bonds in the 1980s to ensure rapid growth. Now they are suffering from the fallout of publicity. In January, both firms had their ratings downgraded to A from A-plus by the insurance rating company A.M. Best and Co.

(See Unisys Ex. 2020). Mr. Zylla admitted "this particular statement is not a comforting statement." (See Tr. of 6/19/97 at 9). Moreover, after reviewing this article, Mr. Zylla did not request another meeting with representatives from Unisys.

60. On March 12, 1990, Mr. Zylla read in the New York Times that "Lawyers for First Executive have for the

moment scotched subpoenas issued by a California state legislative committee investigating, among other things, the company's big junk bond holdings." (See Unisys Ex. 2020; Tr. of 6/19/97 at 10-11). Again, Zylla admitted this was not comforting news and that he did not request another meeting with Unisys representatives.

61. Similarly, on April 9, 1990, Newsweek reported that:

> A handful of insurers own sizeable junk bond portfolios, to largest holder Executive Life. In January the parent company, First Executive, announced a $ 515 million charge against earnings to cover its losses. Last week, the rating firm Standard & Poor's downgraded the company – to BBB, from AAA early in January. Moody's also puts the company at near-junk levels.

(See Unisys Ex. 2020; see also Tr. of 6/19/97 at 13-14). Nevertheless, Mr. Zylla did not request another meeting with Unisys, nor did he transfer his money out of the FIF and ICF.

62. Next, on May 20, 1990, Newsday told the plaintiffs:

> Last week, four months into Carr's year of grace, a musical sound began emanating from First Executive's headquarters – but it wasn't the king's horse reaching for a high note. It was the sound of public relations men whistling past the graveyard, hoping that optimism would convince everyone that First Executive has gotten stronger, when in fact it seems to be getting weaker.

(See Unisys Ex. 2020; see also Tr. of 6/19/97 at 15-16). The article also includes a graph plotting the falling price of First Executive's common stock which, according to Newsday, "indicates a low life expectancy among investors." (See Unisys Ex. 2020). Again, this information was admittedly discomforting to Mr. Zylla (See Tr. of 6/19/97 at 16). Although the conservatorship was some eleven months away, he did not transfer his money.

63. On April 3, 1990, a Wall Street Journal headline told participants that "First Executive Posts a 4th-Quarter Loss of $ 835.7 million; SEC Probe Disclosed." (See Unisys Ex. 2020). According to Mr. Zylla, at the time that this Wall Street Journal article was published, there was still "plenty of time" to transfer his money out of those funds holding Executive Life contracts. (See Tr. of 6/19/97 at 17).

64. On March 5, 1990, a Wall Street Journal article reported the regulatory efforts then made by the California Department of Insurance:

> California's Department of Insurance, concerned about junk-bond laden First Executive Corp., has installed full-time examiners at the company's largest unit and ordered outside consultants to make a detailed review of an apparently substantial surge in policy redemptions.

(See Unisys Ex. 2020; see also Tr. of 6/19/97 at 18). Although the plaintiffs argue that Unisys should have passed along this information to participants, Mr. Zylla's admissions reveal that this fact was already known to the plaintiffs. Further, like most of the claimed failures in Unisys' disclosures, not a single plaintiff testified that had he known this information, it would have made a

difference to his investment decisions. Once again, Mr. Zylla admitted that this information from the Wall Street Journal was discomforting.

65. The New York Times on November 25, 1990, told participants: "The First Executive Corporation, a life insurance company dragged down by investments in high risk junk bonds, said last week that it might hold or substantially reduce dividend payments, and cut or defer payment on its huge debts." (See Tr. of 6/18/97 at 172-73). Again, according to Mr. Zylla, this information was not comforting. Mr. Zylla acknowledged that when he read this, he still had the right to transfer his money, but he chose not to.

66. On December 24, 1990, Business Week reported that:

> Carr seems to have tried some fancy accounting. First Executive appears to have understated the amount of writedowns it is required to make when customers surrender policies. The day of reckoning is December 31st, when the company's accountants begin the annual audit that could force the writedowns. That could drive First Executive's net worth down sharply, triggering a nasty series of reactions that ultimately could prove the company's undoing.

(See Unisys Ex. 2020; see also Tr. of 6/19/97 at 20). Mr. Zylla admitted that this information he gathered on Executive Life was not reassuring.

67. Once again, on October 4, 1990, the Wall Street Journal reported to Mr. Zylla and the class:

> S&P also cut its rating on the claims-paying ability of First Executive's principal unit, Los

> Angeles-based Executive Life Insurance Co., to double-B from triple-B, a three-notch drop. The same lower rating also applies to about $ 1.8 billion of municipal issues supported by Executive Life's guaranteed investment contracts, non-insurance obligations offered by many insurers. Executive Life had $ 60.4 billion of insurance in force at the end of 1989, but policy redemptions since then have reduced that total.

(See Unisys Ex. 2020; Tr. of 6/19/97 at 21-22). Mr. Zylla also admitted that his collection of articles informed him of the rating downgrades.

68. The other class representatives also admitted that they did not read or rely on Unisys' representations regarding Executive Life investments and that a host of other factors animated their investment decisions.

69. More specifically, the plaintiffs admitted that they did not read the Plan documents. (See Tr. of 6/12/97 at 37, 48) ("probably didn't read them").[15] Moreover, the participants admitted that Unisys did not guarantee these investments. (See Tr. of 6/23/97 at 65-67). Plaintiffs also admitted that, rather than reading Plan documents to inform their investment decisions, they relied upon discussions with co-workers:

> Q. Now when you made that change in your allocation, do you recall what documents you may have consulted, if any at the time?

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[15] Class representative Kean testified that he would "casually" look over Plan prospectuses. (See Tr. of 6/12/97 at 60). Class representative Collins stated that he "certainly" did not read Plan documents. (See Tr. of 6/11/97 at 9).

> A. Not – not documents. I don't recall any kind of documents that I – that I [considered]. Like I say, I think that I – it was just a – through conversation with fellow workers and so on, that if I recall, why we did something as far as the percentage.

(See Tr. of 6/23/97 at 68-69). That same class representative admitted that the pursuit of his investment objectives was personal to him and was not influenced by Unisys' documents.

70. Class representative Gary Vala further admitted that nothing Unisys might have told him during the relevant time period would have caused him to handle his investments in a different manner:

> Q: And again, the reason for that was that the money was, as you put it earlier this morning, tied up?
>
> A: Tied up, and I'm also still a believer in insurance investing with insurance companies.
>
> Q: That's right, this morning you said that. For example, you didn't read the prospectus because it wasn't going to change your mind?
>
> A: Exactly.
>
> Q: No information was going to change your mind at that point in time?
>
> A: Correct.

(See Tr. of 6/23/97 at 116-17).

71. Mr. Vala similarly explained that Unisys' disclosures in March of 1990 could not have influenced his decisions, no matter what Unisys might have then said:

Q: Mr. Vala, the transmittal letter asks the reader to read the prospectus which it is transmitting.

A: Mm-hmm.

Q: Which is the March 23rd, 1990 prospectus. Did you read the prospectus?

A: No.

Q: You did not?

A: No.

Q: Did you think the prospectus was an important document to read?

A: No, I had already made my mind up.

Q: Okay and when you say you already made up your mind up, what had you made your mind to do?

A: I was already in the insurance aspect and that's the way, the way I've always dealt, so that's the way I would stay.

Q: So, no matter what was said in the prospectus or document, you were going [sic] stay.

A: In the insurance.

Q: In the insurance fund?

A: Correct.

(See Tr. of 6/23/97 at 109-110).

72. Mr. Vala also admitted his losses, if any, were the fault of non-disclosures on the part of the Plan's auditor's Ernst & Young, and not necessarily Unisys' fault:

Q: Did you believe at that point in time that any other individual or entity had caused you this injury?

A: The accounting firm, Ernst & Young.

See Tr. of 6/23/97 at 103).

73. Class representative Mr. Colby similarly disavowed reliance on Plan documents in framing his investment choices, in favor of conversations with his coworkers:

Q: In making investment decisions with respect to the RIP, did you make those decisions on your own?

A: Yes.

Q: Did you-ever receive advice from an outside advisor?

A: No.

Q: In making these decisions on your own, did you investigate the various investment options in any way in terms of maybe reading brochures or doing outside research?

A: No.

Q: Did you receive literature from Unisys and before that, Sperry, on these various investment options?

A: There was literature, yes.

Q: Do you remember whether you received [sic] that literature in making your decision

A: No, not in any great detail.

> Q: The investment decisions you ended up making, how did you come to decide where to place your money?
>
> A: At the time we made those decisions, it was just discussed by people on the floor where you worked, where you would put it.

(See Tr. of 6/23/97 at 73).

- 74. Class representative Richard Silver testified that he had class representative Henry Zylla warn many Unisys participants to transfer their money (despite Mr. Zylla's contention that Unisys has assured him of the safety of his investments). (See Tr. of 6/23/97 at 91) ("And what we did is we essentially raised the flag. And I think that we felt both Henry and I felt that we had done all that we could have done to warn the people by that time without directly telling them to do it, to get their money out.") (emphasis added). Again, this testimony is entirely at odds with Mr. Zylla's claim that Unisys had lulled Zylla and the class members into not timely transferring their money out of the FIF and the ICF. This testimony is inconsistent with plaintiffs' claims that the class members did not have enough information about their investments.

75. Moreover, class representative Silver readily admitted that his failure to transfer his money was his fault, and not Unisys':

> Q: Why did you believe that everyone else had their money out at that point?
>
> * * *
>
> A: Probably because if they didn't they were stupid as I was.

(See Tr. of 6/23/97 at 91-92).

76. Separate and apart from whether Unisys' disclosures on Executive Life were adequate, plaintiffs' damages expert, Dr. Tsetsekos, admitted that he did no calculation on whether defendants' alleged failure to disclose information to the participants caused any loss:

> Q: Sure, I'd be happy to. You don't have any – you have not calculated any damages, have you, which relate to the alleged failure of Unisys to make adequate disclosures to the plan participants in 1990? Isn't that right?
>
> A: Yes.

(See Tr. of 6/16/97 at 56).

77. In fact, plaintiffs did not offer Dr. Tsetsekos in support of the individualized claims of damages flowing from an alleged non-disclosure of material information. As Mr. Malone explained to the Court, Dr. Tsetsekos's expert testimony was limited to losses incurred by the Plan from the purchase of Executive Life GICs:

> Mr. Malone: Your Honor, we would offer this witness as an expert in the field of finance. We believe his testimony would be of assistance to you in determining the financial consequences to the Unisys savings plan, the Retirement Investment Plan or Retirement Investment Plan II in analyzing what the consequences were of the acquisition of the Executive Life GICs and, more particularly, what the potential damages are.

(See Tr. of 6/16/97 at 19) (emphasis added).

78. Unisys also presented the testimony of George Strong, a partner at Price Waterhouse LLP, on the issue of the participants' damages. As more fully explained

below, this issue is related to the threshold question concerning whether the purchase of Executive Life GICs was prudent in the first instance, and whether the investments were properly diversified. If the participants suffered no damages then, of course, there can be no finding of a fiduciary breach.

79. Mr. Strong plotted the percentage of the Executive Life GICs as part of the combined assets of the FIF and ICF. (See Tr. of 6/20/97 at 21-23; Unisys Ex. 2624). Such an inquiry was appropriate given the fact that the FIF and ICF worked together as one fund. (See Tr. of 6/20/97 at 23). While the Executive Life investment exceeded the 20% level in 1988, the amount of Executive Life investments in these funds totaled between 15.5% and 15.3% on the date of the seizure of Executive Life. (See Unisys Ex. 2624).[16]

80. Each of the Executive Life contracts has returned all of the principal invested, with interest. Stated differently, contract # 1238 yielded a 5.56% return; contract # 1267 realized a 4.59% return; and contract # 1279 earned a 3.88% return. (See Unisys Ex. 2664). These returns evidence the fact that the Executive Life contracts returned the participants' principal, and earned some interest income.

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[16] Again, although plaintiffs claimed that Unisys did not have written investment guidelines, including a diversification limit, they failed to offer any proof on how this caused them harm. In that regard, Mr. White further explained his understanding of the guidelines Unisys then followed, even in the absence of a writing on the subject. (See Tr. of 6/17/97 at 24-25).

81. Mr. Strong further explained that the correct way to analyze the claimed damages is to assess how the portfolio performed in the aggregate, rather than looking to the assets making up the portfolio, i.e., the individual Executive Life contracts. (See Tr. of 6/20/97 at 22-23). The aggregate performance of the funds must be compared to an appropriate benchmark, here treasury bill rates, to determine whether, in fact, the participants have suffered any losses. If the return on the participants' investments exceeded these norms, there can be no finding of damages.

82. This portfolio approach is particularly appropriate given the plaintiffs admissions that they looked to the performance of the funds, rather than the individual GICs, to determine the success of their investments. Plaintiffs' damages expert, Dr. Tsetsekos, similarly testified that the participants could not invest in any particular GIC, but had to spread their money across the GICs that made up the portfolio of investments in the ICF and the FIF. (See Tr. of 6/16/97 at 54).

83. Even accounting for the fact that the Executive Life GICs did not return to participants as much interest on the contracts as promised, the portfolio's performance exceeded the appropriate benchmarks. Mr. Strong explained that, using 90-day and five-year treasury bill rates as a means for comparison, the combined FIF and ICF exceeded these benchmarks by $ 248.62 million and $ 85.41 million, respectively. (See Unisys Exs. 2745, 2746; Tr. of 6/20/97 at 23-25). Mr. Strong further explained that the "benefits responsiveness" nature of the contracts, allowing for the return of money to the participants in

certain instances, required the examination of the portfolio against these two standards. In other words, the appropriate benchmark lies somewhere between the 90-day and five-year treasury rates but, in any event, the combined ICF and FIF returns well exceeded both benchmarks.

84. Mr. Strong also compared the combined ICF/FIF performance to a reference work on the historical returns on GICs. Mr. Strong found that his treasury bill benchmarks yielded a favorable result, demonstrating that the FIF/ICF outperformed comparable GIC funds. (See Tr. of 6/20/97 at 56-58). This comparison showed that the Unisys funds exceeded the performance of the historical norms by some 30 to 65 basis points. In sum, Unisys demonstrated that, even accounting for the fact that the Executive Life contracts did not return as much interest as promised at the time of purchase, the participants did not suffer any legally-cognizable injury because their investments outperformed the appropriate benchmark comparisons.

85. In that regard, I note that Dr. Tsetsekos did not examine the portfolio of investments, despite his admission that Unisys participants could not invest in any particular GIC (and had to spread their money across the funds' investments). (See Tr. of 6/16/97 at 53-54).

86. Dr. Tsetsekos testified that his damages calculation started from the presumption that Executive Life posed the highest level of risk to participants. (See Tr. of 6/16/97 at 67). Moreover, Dr. Tsetsekos testified that the relative rate offered by a GIC bidder may reflect the level of risk. He then admitted, however, that the Executive

Life bids, at the shorter maturities, were lower than other bids. In other words, it cannot be said that Executive Life necessarily posed the highest risk to participants. This is particularly important given Tsetsekos' further admission that, unless the predicate to his methodology is true, i.e., that Executive Life was consistently the highest bidder and posed the highest risk to participants, the rationale for his approach to calculating damages "disappears."

87. Dr. Tsetsekos also admitted that in determining his representative rate, from which he calculates damages, he did not determine whether the representative bidders he selected could have accepted the amounts of money Unisys was then bidding. Moreover, Tsetsekos' approach did not properly account for the risk of default within the group of issuers used to determine his representative rate.

88. Dr. Tsetsekos further testified that he adopted the triple-A Solomon Brothers bond index to determine the damages owed to participants after the expiration of the contracts, without having made actual inquiry into the investment strategies and propensities of the participants. Indeed, Dr. Tsetsekos admitted that the assumption he made regarding the participants' likely use of the money was "quite subjective."[17]

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[17] Mr. Zylla and class representative Kean both put the money return from Executive Life into equity investments, see supra at 26 n.12, and Dr. Tsetsekos failed to incorporate this testimony into his analysis. (See Tr. of 6/16/97 at 96-98). Stated differently, Tsetsekos simply assumed that the plaintiffs would reinvest their money into the same risk class, despite plaintiffs' admission to the contrary. (See Tr. of 6/16/97 at 112-13).

89. Dr. Tsetsekos also admitted that he failed to conduct calculations to determine the "confidence" of his results, and, as such, his damages calculation was, at best, "an estimate."

90. It is also significant that Dr. Tsetsekos stated that he did no specialized calculation of the damages allegedly caused by a failure to diversity [sic]:

> Q: Before the break – well, let me start this way. I asked you this morning about the act that gives rise to damages and am I correct that the purchase was the act that gives rise to damages in your view?
>
> A: Yes, it is.
>
> Q: Okay. Now, I take it that none of your damages are the result of any claims that that [sic] the plaintiffs are making about diversification, is that right, or the failure of the fiduciaries to adequately diversify? You don't measure damages with that –
>
> A: No, not in terms – no, I haven't been asked to do that.

(See Tr. of 6/16/97 at 99) (emphasis added).

91. In sum, as the trier of fact, I credit the testimony of Mr. Strong over that of Dr. Tsetsekos and find that the plaintiffs suffered no damages as the result of Unisys' decision to purchase the Executive Life GICs (the only claim upon which plaintiffs offered evidence of damages).

92. Plaintiffs complain that Unisys replaced an Executive Life annuity, used to fund the non-qualified retirement benefit of Michael Blumenthal, Unisys' former

chairman. From this premise plaintiffs maintain that Mr. Blumenthal's actions should have prompted Unisys to give different or additional warnings to participants regarding their investments in Executive Life.

93. Mr. Blumenthal's benefits were paid pursuant to a non-qualified plan, not subject to ERISA. (See Tr. of 6/11/97 at 175-76) ("Mr. Blumenthal's contractual arrangements with the board of directors was a personal matter."). (See also 6/12/97 at 21). Assuming this evidence has some relationship to the Plan, the best that can be said of plaintiffs' proffer is that one executive-level "participant" exercised his right to be rid of Executive Life, a right enjoyed by each of the plaintiffs. Nothing in ERISA requires a plan sponsor to communicate to participants information regarding the investment decisions of other participants.

94. Moreover, there is absolutely no evidence offered at trial that Mr. Blumenthal's actions were motivated by "inside" information or special knowledge regarding the circumstances at Executive Life. In that regard, I note further that Mr. Charles Service, perhaps the Unisys executive then enjoying the most information about Executive Life in 1990 and 1991, did not transfer his money prior to the imposition of the conservatorship. (See Tr. of 6/10/97 at 52).

95. In any event, not one plaintiff testified that had he access to this information, he would have transferred his money. Moreover, given Mr. Silver's admissions that he had ample information about Executive Life and that he and Mr. Zylla instructed other participants to transfer their money, the circumstances regarding Mr. Blumenthal

are immaterial to the question of whether Unisys' disclosures were adequate.

96. According to Mr. Service, formerly vice president of capital management and trust investments at Unisys, the company considered reducing the "equity wash," or time period that a participant, looking to transfer his money out of the FIF and/or ICF, had to keep the money in one of the equity funds offered by the Plan. (See Tr. of 6/9/97 at 119-20, 160-62, 177-80). In other words, to reduce the likelihood of the participants engaging in interest rate arbitrage, by transferring the money between the FIF and/or the ICF and the STIF to capitalize on interest rate fluctuations, participants had to keep their money in an equity fund for twelve months.

97. Because the cash flows on each of the GICs would necessarily be influenced by the change in the twelve month equity waiting period, or "equity wash," Unisys sought the approval of each of the issuers of the ICF and FIF. (See Plaintiffs' Ex. 5). Reduction of this waiting period worked, of course, to the benefit of the participants.

98. An agreement was later reached on October 17, 1990 with Executive Life allowing for the reduction of the equity wash from twelve to six months. The document further provided that:

> Unisys Corporation hereby further agrees that neither it nor its affiliates, employees, agents or representatives will communicate with Plan participants regarding the financial condition or prospects of Executive Life nor issue any other communication regarding Executive Life which could be reasonably viewed as attempting to

> influence the investment choices of Plan participants without first obtaining Executive Life's written approval of such communications. In the event such prior written approval is not obtained, Executive Life may elect to not honor employee requests for withdrawals or reallocations provided that Executive Life reasonably believes that such requests were the direct result of such communication. The above restrictions shall not be construed to prohibit Unisys Corporation from distributing its usual quarterly statements to Plan participants, from publishing monthly earnings results of the various investment options available under the Plan, from distributing in the normal course of business any other employee communication, not regarding Executive Life, regarding the savings plan or from distributing any other communications required by law, regulation or directive of any federal agency.

Id. (emphasis added).[18]

99. Unisys was already contractually obligated to avoid attempts to influence participant transfers; hence,

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[18] I note further that the quotation of this letter in the Court of Appeals opinion omitted the qualifying language expressly permitting Unisys to make disclosure "required by law." See *Unisys*, 74 F.3d at 431. Given the task then before the Court of Appeals, reviewing a grant of summary judgment, the exclusion of this particular language may have been appropriate. However, at trial the balance of the paragraph now properly informs this Court regarding the issue at hand and underscores the evidence that Unisys was already contractually obligated not to make disclosures of the sort arguably proscribed by the letter agreement with Executive Life.

Unisys, with the letter agreement, did not give up anything new. In other words, withdrawals from the ICF and FIF had to be accomplished pro rata from all of the issuers in the portfolio. (See Tr. of 6/9/97 at 159). As Mr. Service explained, "the insurance contract fund was a portfolio of contracts and one bought a – units within the fund and, so, that meant one had a pro rata share of every contract in that fund." (See also Tr. of 6/10/97 at 29).[19] Unisys had already promised, in several of the other GICs, not to influence participant transfers.[20] As such, Unisys merely promised Executive Life to avoid conduct it had already promised to refrain from.

100. In any event, at no time did Unisys' agreement with Executive Life cause Unisys to fail to pass along information concerning Executive Life which Unisys

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[19] See also *Unisys*, 74 F.3d at 426 ("Contributions to the Insurance Contract Fund were allocated on a pro rata basis among the various GICs held therein.").

[20] For example, the GIC between the Plan's trustee and the Hartford Insurance Company provided as follows:

> PARTICIPANT INVESTMENT COMMUNICATIONS. The term "Participant Investment Communications" means any communication concerning the investment made pursuant to the terms of this contract, either verbal or written, which is prepared for delivery to Participants. The Contractholder agrees not to deliver any communication concerning the investment made pursuant to the terms of this contract to Plan participants without The Hartford's prior determination that such communication will not have the effect of inducing Plan participants to elect to transfer all or part of their accounts into or out of this Contract.

(See Unisys Ex. 1027).

would otherwise have disclosed. (See Tr. of 6/9/97 at 147). Moreover, as explained above, there was voluminous public information already available on the status of Executive Life.

101. In support of the claim that Unisys breached its fiduciary duties in purchasing the Executive Life GICs, plaintiffs tendered, as a possible expert witness, Dr. George M. Gottheimer.[21] Dr. Gottheimer has a Ph.D. from the California Coastal University, a "non-traditional" institution, or more simply, a correspondence school. (See Tr. of 6/19/197 at 44).

102. Dr. Gottheimer admitted during cross-examination in the voir dire process that his experience in insurance was largely, if not exclusively, dedicated to the property casualty area, and not to life insurance. Executive Life, as the name suggests, was a life insurance company. Gottheimer testified that he could not recall whether his previous expert witness engagements involved life insurance matters or property casualty matters. (See Tr. of 6/19/97 at 54). Again, on cross-examination, he was impeached with a deposition he gave in another matter:

> Q: Okay. Now, isn't it true that in every case in which you've testified as an expert, that all

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[21] It should be noted that plaintiffs offered no expert testimony on the issue of whether the purchase of these Executive Life GICs breached ERISA's diversification standards. Counsel for the plaintiffs stated that Gottheimer was to testify only on the tests "performed in conducting an analysis of the financial condition of insurance companies." (See Tr. of 6/19/97 at 63).

those assignments related to property and casualty – the property and casualty business?

A: I really don't recall whether any of them were on life insurance matters. Most of my work is in property and casualty. I just don't recall. I have been retained for a lot of life insurance matters, but I don't recall whether I actually testified in court of any of them. I just don't remember.

Q: You recall that you testified at a deposition in a case involving the Budded [sic] Company, don't you?

A: Yes.

Q: Do you recall testifying there that 24 of the 25 testimonial assignments that you had involved the property and casualty business and not the life insurance business?

A: At that time, yes.

Q: Great, can you tell the Court whether you've had any times that you've been qualified as an expert in the life insurance business since 1993?

A: When you say you qualified, do you mean in court?

Q: Yes.

A: I just answered that, I cannot recall ever having testified in court on a life insurance case. I've been involved in a lot of cases which I've been deposed on, but not where it leads to trial.

(See Tr. of 6/19/97 at 54-55).

103. Dr. Gottheimer was similarly impeached with his deposition regarding the consulting work he had

done for property casualty insurance companies, as opposed to life insurance companies. In this instance, Gottheimer disavowed his sworn deposition testimony:

> Q: Now, isn't it also true that you've never done consulting work for public or private corporations that involved the financial solvency of life insurance companies?
>
> A: That's not true.
>
> Q: Do you recall that on September 8th of 1994, your deposition was taken in this case?
>
> A: I do recall that.
>
> Q: Page 53 at the bottom. And do you recall being asked the following question: "Okay, have you done consulting work for public and private corporations involving the financial solvency of life insurance companies?" Answer, "Not that I can recall, no"? Do you recall that testimony?
>
> A: Yes, I do.
>
> Q: Does that refresh your recollection, Mr. Gottheimer –
>
> A: Yes.
>
> Q: – that you've never been retained by a public or private corporation, at least, as of 1994 to evaluate the financial solvency of the life insurance company?
>
> A: What I said at my deposition was not that I can recall. I can recall one now and since that time, I've done several.
>
> Q: But in 1994, you couldn't recall any, now you can recall one?

A: I can recall one that I did prior to 1994, yes.

Q: All right, so from 1953 when you went in the insurance business until 1994, you can recall one time that you've provided consulting work for a public or private corporation involving the financial solvency of a life insurance company, right?

A: That's correct.

(See Tr. of 6/19/97 at 55-56).

104. On the critical question of whether Dr. Gottheimer's experience in the property casualty field was transferable to the life insurance area, Dr. Gottheimer was, once again, impeached with his deposition:

Q: Wouldn't you agree that there are significant differences between evaluating a life insurance company and the property and casualty insurance company?

A: There are some differences and there are also some similarities in the way we do it.

Q: Do you recall also at the September 8, 1994 deposition on Page 57, Line 12, I asked you the following questions. "Okay, by the way, are there fundamental differences between evaluating the solvency of a property and casualty insurer on the one hand [and] a life insurer on the other? Answer: "Yes." Do you recall that testimony?

A: Yes, I do.

(See Tr. of 6/19/97 at 56-57).

105. Dr. Gottheimer's experience in the insurance area was limited to property casualty insurance and not

life insurance. By his own admission, there are "fundamental differences" between the creditworthiness analysis for a property and casualty insurance company and the creditworthiness analysis of a life insurer. Plaintiffs did not tender an appropriate expert on the question of whether Unisys failed to evaluate adequately the creditworthiness of Executive Life.

II. CONCLUSIONS OF LAW

A. The General Prudence Standard

1. Under section 4049(a)(1)(B) of ERISA [sic], a fiduciary must discharge his duties: "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

29 U.S.C. § 1104(a)(1)(B).

2. As the Court of Appeals further explained: "The courts measure section 1104(a)(1)(B)'s prudence requirement according to an objective standard, focusing on a fiduciary's conduct in arriving at an investment decision, not on its results, and asking whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." *Unisys* 74 F.3d at 434. Moreover, hindsight cannot play a role in determining whether a fiduciary's actions were prudent. "Whether a trustee has acted properly in selecting an investment depends upon the circumstances at the time

when the investment is made and not upon subsequent events." Id.

3. Based on the evidence at trial, I find that the Unisys fiduciaries undertook adequate and reasonable steps before purchasing the three Executive Life contracts. In the first bid, they were assisted by an experienced consultant who recommended reliance on Standard & Poor's ratings. In subsequent bids, Unisys similarly relied upon all of the standard rating services to analyze the creditworthiness of the bidders, including Executive Life. They also considered other important factors, both before and during the bids, before choosing to invest in Executive Life. As described in the above findings of fact, I find credible the testimony of Messrs. White, Level and Becker on the reasonableness and thoroughness of the investigation conducted before the purchase of the Executive Life GICs.

4. Given the fact that these investments returned all of the principal with interest, and that the portfolios exceeded the relevant benchmarks, the risks taken were not imprudent. Cf. *Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, 473 (7th Cir. 1977) [sic] (adopting "no harm, no foul" rule, Seventh Circuit holds plaintiffs are not entitled to recovery of damages for that breach absent proof of an actual economic loss).

5. I note that the Court of Appeals' opinion describes an alternative basis for finding that the purchase of the Executive Life contracts was consistent with fiduciary standards. The Unisys opinion cites to two other opinions: *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d

915 (8th Cir. 1994) and *Fink v. Nat'l Sav. and Trust Co.*, 249 U.S. App. D.C. 33, 772 F.2d 951 (D.C. Cir. 1985).

6. Both Roth and Fink recognize that ERISA's causation requirement, contained in section 409(a), 29 U.S.C. § 1109(a), commands an inquiry into whether there is any objective evidence of prudence.[22] If such evidence is present, a fiduciary cannot be held liable in damages. As Justice Scalia explained in Fink:

> I know of no case in which a trustee who has happened – through prayer, astrology or just blind luck – to make (or hold) objectively prudent investments (e.g., an investment in a highly regarded "blue chip" stock) has been held liable for losses from those investments because of his failure to investigate and evaluate beforehand.

Fink, 772 F.2d at 962.

7. The Eighth Circuit, in one of the opinions cited with approval by the Court of Appeals in Unisys, explained further:

> Even if a trustee failed to conduct an investigation before making a decision,he is insulated from liability if a hypothetical prudent fiduciary would have made the same decision anyway.

Roth, 16 F.3d at 919.[23] Read together, Roth and Fink establish the fundamental principle that, if the Executive

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[22] Cf *Unisys*, 74 F.3d at 434 (prudence measured "according to an objective standard").

[23] See also *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995) ("[A] fiduciary's failure to investigate an investment decision alone is not sufficient to show that the decision was not reasonable.") (emphasis added).

Life investment itself was reasonable and would have been made by a "hypothetical prudent fiduciary," there can be no finding of damages against Unisys.[24]

8. First, aside from the fact that the federal regulatory standard then in place reveals the prudence of Unisys' actions,[25] judicial decisions endorsing the

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[24] See also *Glennie*, 912 F. Supp. at 1001 ("Even if a fiduciary fails to make an adequate investigation, that fiduciary is not liable if a hypothetically prudent fiduciary would have made the same decision after making an adequate investigation.").

[25] More specifically, during the relevant time period the Pension Benefit Guaranty Corporation ("PBGC") and the Department of Labor established a flexible standard for the purchase of insurance annuities upon the termination of a defined benefit pension plan, pursuant to ERISA section 404(b)(3)(A)(I), 29 U.S.C. § 1341(b)(3)(A)(I). In that context, to satisfy the entirety of an individual's pension benefit for his lifetime, both of these regulatory agencies required only that the insurance company selected be state licensed. See 29 C.F.R. §§ 2617.4, 2617.22 (PBGC); 29 C.F.R. § 2510.3-3(d)(2)(ii)(A)(1)(DOL). A further explanation of the use of annuities to facilitate the termination of a defined benefit pension plan may be found in *Riley v. Murdock*, 890 F. Supp. 444 (E.D.N.C. 1955), aff'd, 83 F.3d 415 (4th Cir.), cert. denied, 136 L. Ed. 2d 304, 117 S. Ct. 387 (1996). Moreover, the relevant regulatory community instructed fiduciaries that the state regulatory mechanism ensured that investments in insurance companies was a safe decision. As the PBGC told fiduciaries in 1981, insurance company investments are prudent given the strict regulatory milieu within which insurers operate:

> Such companies are subject to strict statutory requirements and administrative supervision. In fact, the reason insurance companies are so extensively regulated is to ensure that their obligations can be satisfied.

46 Fed. Reg 9532, 9534 (1981). Further, it would be

purchase of Executive Life annuities demonstrate that a hypothetical prudent fiduciary could properly invest participant assets in Executive Life. *E.g., Riley v. Murdock*, 890 F. Supp. 444, 458-60 (E.D.N.C. 1995) (purchase of Executive Life annuities not a breach of fiduciary duty, even where fiduciary stands to recoup surplus pension assets in the defined benefit plan termination context).

9. I note also that Mr. Becker continued to include Executive Life on his approved list of GIC bidders until June, 1988, six months after Unisys made its third purchase of Executive Life GICs. (See Tr. of 6/10/97 at 176).

10. Moreover, and as found above, Unisys was presented with a list of the other well-known pension plan sponsors then purchasing Executive Life GICs. See supra. Such information may properly be considered by a fiduciary in discharging his responsibilities. *Demoulis v. Sullivan*, 1993 U.S. Dist. LEXIS 3250, No. 91-12533-Z, 1993 WL 81500, at *6 (D. Mass. Feb. 26, 1993).

11. While the "hypothetical prudent fiduciary" analysis of Fink and Roth is grounded in ERISA's causation provision, equally important to any such inquiry is the simple fact that, because discretion is the hallmark of

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"unlikely . . . than [sic] an insurance company should fail and its obligations cannot be satisfied." Id. Simply stated, the federal government told fiduciaries, during the time period relevant here, that, upon termination of a defined benefit pension plan, all of a participant's money could be put into one state licensed insurer, for that participant's lifetime. As such, Unisys cannot have breached its fiduciary duty in placing some 15% of participants' money into Executive Life for five years. Not only was Executive Life state licensed, it enjoyed an AAA rating from Standard & Poor's.

fiduciary conduct, a fiduciary's actions are judicially reviewed under a deferential standard. According to the Supreme Court, "only when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration, 'does a person become a fiduciary under [ERISA] § 3(21)(A)."[26] The investment of pension plan assets is, of course, a discretionary activity.[27]

12. The deferential "arbitrary and capricious" standard must be employed to scrutinize all of plaintiffs' fiduciary breach claims. The arbitrary and capricious standard of review, applied originally to ERISA benefits claims brought under 29 U.S.C. § 1332(a)(1)(B),[28] applies with equal force to fiduciary breach claims, like those here:

> Characterizing a denial of benefits as a breach of fiduciary duty does not necessarily change the standard a court would apply when reviewing the administrator's decision to deny benefits.

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[26] *Lockheed Corp v. Spink*, 517 U.S. 882, 135 L. Ed. 2d 153, 116 S. Ct. 1783, 1789 (1996) (quoting *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (1995)).

[27] The commentary to section 187 of the Restatement (Second) of Trusts, the section relied on in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989), extends this discretionary authority to investment decisions. See Restatement (Second) of Trusts § 187 cmt. C (1959) (the discretionary authority "is applicable . . . to powers to lease, sell or mortgage the trust property or to invest trust funds . . . ") (emphasis added). See also supra at P16 (Unisys plan documents gave discretion to fiduciaries).

[28] See *Firestone Tire and Rubber Co.*, 489 U.S. 101, 103 L. Ed. 2d 80, 109 S. Ct. 948.

> After all, Firestone, which authorized deferential court review when the plan itself gives the administrator discretionary authority, based its decision upon the same common-law trust doctrines that govern standards of fiduciary conduct.

Varity Corp. v. Howe, 516 U.S. 489, 116 S. Ct. 1065, 1079, 134 L. Ed. 2d 130 (1996). In other words, given the deference owing to the fiduciaries, if reasonable minds can differ on the prudence of Unisys' investments, Unisys is entitled to judgment in its favor.[29]

13. The Supreme Court's ruling in Varity, that fiduciary breach claims should be resolved under the deferential "arbitrary and capricious" standard, dovetails precisely with the Third Circuit's recent opinion in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), cert. denied, 133 L. Ed. 2d 847, 116 S. Ct. 917 (1996):

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[29] As the Kuper court observed:

> Evidence submitted by Defendants confirmed that numerous established and presumably impartial investment advisors issued reports during the relevant time periods that encouraged investors either to buy or to continue to hold Quantum Stock. Indeed, evidence that independent, professional observers of market trends differed in their projections of future Quantum Stock performance merely underscores the fact that circumstances then existing would not have compelled reasonable persons to a singular conclusion about the stock's future prospects. . . . Defendants cannot be said to have been objectively imprudent for having acted in the same manner as impartial observers had recommended.

Kuper, 852 F. Supp. 1389, 1398 (S.D. Oh. 1994).

> We believe that after Firestone, trust law should guide the standard of review over claims, such as those here, not only under section 1132(a)(1)(B) but also over claims filed pursuant to 29 U.S.C. § 1132(a)(2) based on violations of the fiduciary duties set forth in section 1104(a). After all, section 1104(a) also abounds with the language of trust law, and the Supreme Court previously has noted that "Congress invoked the common law of trusts to define the general scope of [fiduciaries'] authority and responsibility."

Moench, 62 F.3d at 565 (quoting *Central States, S.E. and S.W. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570, 86 L. Ed. 2d 447, 105 S. Ct. 2833 (1985)). Measured by any standard, the Unisys fiduciaries' actions are consistent with the prudence requirements of ERISA.[30]

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[30] In fact, to allow these plaintiffs to recover would turn the distinction between defined contribution and defined benefit pension plans on its head. As discussed above (and as made clear in the Savings Plan documents), in defined contribution plans, participants, not Unisys, bear the risk of loss. To impress liability here would strip Unisys of the statutory protections owed to a savings plan sponsor. As the Seventh Circuit observed, in similar circumstances:

> The appellants are trying to convert a defined-benefits plan into a defined contributions plan – or more precisely to have the best of both worlds, where the employer bears the entire downside risk from investment of the pension plan's assets but all the gains accruing from investment performance that creates surplus assets enure to the employees. This is an inequity of the heads I win, tails you lose variety that neither the ERISA statute nor the . . . plan documents perpetrate.

Bash v. Firstmark Standard Life Ins. Co., 861 F.2d 159, 163 (7th Cir. 1988) (citations omitted) (emphasis added).

B. Plaintiffs' Failure to Tender an Expert

14. As the Court of Appeals held in its opinion remanding this matter for trial, courts measure ERISA's prudence requirement according to an objective standard. The analysis focuses on a fiduciary's conduct in arriving at an investment decision and asks "whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." *Unisys*, 74 F.3d at 434.

15. As noted above, after hearing all of the testimony at trial, I conclude that Unisys satisfied the fiduciary standards applicable to the selection of these investments for inclusion in the Plan. I find that Messis. [sic] White and Level had the appropriate education and experience in such matters and explained the thoroughness of the investigation of creditworthiness done by Standard & Poor's. Defendants have also satisfactorily demonstrated the level of care they exercised both before and during the bids, as well as the multitude of analyses and considerations undertaken before the selection of the Executive Life GICs. I further find that Murray Becker, the consultant relied upon for the first relevant bid, was an expert in such matters, having handled more than 500 similar placements of pension monies. Unisys' reliance on Mr. Becker was consistent with its fiduciary responsibilities. Compatible with the hypothetical prudent fiduciary standard, Mr. Becker kept Executive Life on its approved list of bidders until June, 1988.

16. Executive Life was state licensed and, further, the state regulatory system worked to ensure that each participant was returned his principal investment in

Executive Life, with interest. I reach this conclusion without the assistance of an expert and find further, upon review of the entirety of the record, that no expert was needed under Federal Ruled [sic] of Evidence 702.

17. In any event, were a reviewing court to determine that expert assistance was necessary under Federal Rule of Evidence 702, plaintiffs failed to proffer an appropriate expert witness. As noted above, I refused to qualify Dr. Gottheimer as an expert under Rule 702, because Dr. Gottheimer's experience is not related to the issues regarding life insurance solvency.

18. Indeed, Dr. Gottheimer claims a doctoral degree from a correspondence school, an additional ground for my refusal to qualify him as an expert. As another court held, in like circumstances:

> Mr. Justino's educational background is insufficient to qualify him as an expert in this case. Mr. Justino explained to the court that Southwest University provides a non-traditional education with independent study projects – in effect a correspondence school institution. The Court finds that an institution which dispenses degrees in such a manner, cannot be relied upon by a professional as a qualification to an be [sic] expert witness.

Van Blargan v. Williams Hospitality Corp., 754 F. Supp. 246, 249 (D.P.R. 1991). Further, if given the chance to testify, I could not find him to be a credible witness given his evasiveness, if not his propensity to state falsehoods. See

supra PP 102-04.[31] In that regard, I note that during the expert qualification process, Dr. Gottheimer was impeached no fewer than four times on the relatively straight forward questions on his qualifications.

19. As noted above, Unisys tendered ample credible evidence that its actions were prudent. I can make this finding without expert assistance. The witness plaintiffs offered as an expert was not qualified to testify on these issues.

C. Communications to Plan Participants

20. The Third Circuit held further that Unisys had a fiduciary obligation to communicate to participants the information needed so that participants could "make an adequately informed decision about whether to place or maintain monies" in the FIF and/or ICF. *Unisys*, 74 F.3d at 442.

21. Nevertheless, the Court of Appeals carefully circumscribed those disclosure obligations. First, the Court did not "determine whether Unisys had a duty under section 1104(a) to communicate anything at all to the Plan's participants about these matters in the first place." *Id.* At 442-43. Moreover, "We also note that we do not view the plaintiffs as claiming, nor do we hold, that Unisys was obligated to give investment advise, [sic] to opine on Executive Life's financial condition or to predict

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[31] See also *Surace v Caterpillar, Inc.*, 111 F.3d 1039, 1056 (3d Cir. 1997) (affirming district court's refusal to qualify witness as expert, because witness had neither reviewed appropriate literature nor participated in appropriate studies).

Executive Life's eventual demise." *Id.* at 443. In that regard, the court further stated, "we hasten to add that ERISA does not impose a 'duty of clairvoyance' on fiduciaries." Id.[32]

22. Moreover, the disclosure obligation is limited by the materiality standard, "we also hold that in this context, a misrepresentation is 'material' if there was substantial likelihood that it would have misled a reasonable participant in making an adequately informed decision about whether to place or maintain monies in the Fixed Income and/or Insurance Contract Funds." *Unisys*, 74 F.3d at 442.

23. Implicit in all of the aforementioned limitations on Unisys' disclosure obligations is the fact that ERISA fiduciaries need not pass along to participants information about which those participants are already aware. According to the Court of Appeals in Unisys, quoting the Restatement (Second) of Trusts:

> Even if the trustee is not dealing with the trustee's own account, he is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person.

Unisys, 74 F.3d at 441 n.16 (quoting Restatement (Second) of Trusts § 173 cmt.d) (emphasis added); see also *Glaziers and Glassworkers Local No. 252 Annuity Fund v. Newbridge*

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[32] Quoting *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir.), cert. denied, 510 U.S. 1020, 126 L. Ed. 2d 586, 114 S. Ct. 622 (1993).

Secs., 93 F.3d 1171, 1181 (3d Cir. 1996) (same).[33] As described above, there was ample publicly-available information on Executive Life, as the Third Circuit held. See *Unisys*, 74 F.3d at 431.

24. Again, as a fiduciary breach claim under ERISA, governing Supreme Court and Circuit authority teaches that the fiduciaries are entitled to use their discretion in discharging their obligations. The Third Circuit recently voiced its views on the competing considerations relevant to a court's review of an ERISA fiduciary breach claim raising an alleged failure to disclose. E.G. *Fischer*, 96 F.3d at 1541 ("Finally, as a matter of policy, we note that imposing liability too quickly for failure to disclose a potential early retirement plan could harm employees by deterring employers from resorting to such plans."), cert. denied, 117 S. Ct. 1247 (1997)). The ruling in Fischer dovetails the Supreme Court's holding Varity that all fiduciary breach claims are to be evaluated based on a deferential standard of review.[34]

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[33] Very recently, the Court of Appeals again underscored this limitation on a fiduciaries' disclosure obligation. See *Jordan v. Federal Express Corp.*, No. 96-3103, 116 F.3d 1005, 1997 U.S. App. LEXIS 14801, at *31 n.17 (3d Cir. June 19, 1997) (quoting Restatement (Second) of Trusts § 173, comment d).

[34] Mindful of the distinction drawn between business and fiduciary decisions, the Fischer court further held that "[a] corporation could not function if ERISA required complete disclosure of every facet of these on-going activities." *Fischer*, 96 F.3d at 1539. These considerations apply directly to those claims surrounding Mr. Blumenthal. To require disclosure of Mr. Blumenthal's circumstances would equally compel the disclosure of information about each Unisys executives' investments (including those not subject to ERISA). To adopt

25. Moreover, before Unisys can be found liable for fiduciary breach for failing to disclose information regarding the Plan's investments, the plaintiffs first must meet each element of their claim, including that Unisys' alleged misconduct somehow caused a loss. In other words, plaintiffs shoulder the burden of proving that each plaintiff relied upon Unisys' disclosures, or non-disclosures, to his detriment.[35]

26. The statue [sic] expressly requires such proof. Before liability for fiduciary breach may attach, a plaintiff must show that the fiduciaries' actions caused a loss:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach. . . .

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such "a standard could result in an avalanche of notices and disclosures." Id. Moreover, although plaintiffs maintain that Unisys should have disclosed a contingency plan it adopted prior to the conservatorship to properly account for the Executive Life GICs in the event of a freezing of withdrawals, this information was not material to the participants, given the wealth of information already available. In any event, no plaintiff testified that the failure to disclose this information influenced his investment decisions and, as such, there can be no finding that this claimed lack of disclosure caused any harm.

[35] Causation is an essential element of an ERISA claim for failure todisclose. E.g, *Jordan*, 116 F.3d 1005, 1997 U.S. App. LEXIS 14 801, at *34.

29 U.S.C. § 1109(a) (emphasis added). In other words, and as long recognized by the Court of Appeals,[36] ERISA mandates that a plaintiff demonstrate a "causal connection" between an alleged fiduciary breach and the losses claimed. *Unisys*, 74 F.3d at 445 ("Under 29 U.S.C. § 1109, where 'a fiduciary . . . who . . . breaches . . . shall be personally liable to make good . . . any losses resulting from each such breach', a causal connection is required between the breach of the fiduciary duty and the losses alleged.") (emphasis added).[37]

27. In sum, ERISA requires that the plaintiffs prove not only that Unisys made "material misrepresentations" about Executive Life, but that the misrepresentations caused each plaintiff either to invest in Executive Life

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[36] See also *Fischer*, 994 F.2d at 135 ("[A] misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision. . . ."); *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 57 F.3d 1255, 1266 (3d Cir. 1995), cert. denied, 134 L. Ed. 2d 470, 116 S. Ct. 1316 (1966) (in evaluating the evidence adduced at trial, the court considered Unisys' misrepresentations and Unisys' knowledge that "its misrepresentations were material to the beneficiaries' circumstances because the misrepresentations influenced their decisions to retire"); *Bixler v. Pennsylvania Teamsters Health and Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) (describing the following facts of *Eddy v. Colonial Life Ins Co.*, 287 U.S. App. D.C. 76, 919 F.2d 747 (D.C. Cir. 1990), as quite similar to Bixler in that "because of alleged misinformation provided by the insurer, Mr. Eddy did not convert his benefits to an individual policy and thus lost his health coverage").

[37] Quoting *Brandt v. Grounds*, 687 F.2d 895, 898 (7th Cir. 1982).

and/or keep their money with the insurer, notwithstanding emerging information about the decline in Executive Life's portfolio. On this record, plaintiffs cannot meet their burden.

28. In other words, the record reveals that plaintiffs had all the information they needed to make informed choices about their investments. Based on the record before me wherein the class representatives went so far as to warn other participants to move their money out of the FIF and ICF, I find that Unisys had no obligation to disclose to the participants that which they already knew. Moreover, the plaintiffs admitted they did not read the Plan documents to inform themselves when making their investment choices and also admitted that, no matter what Unisys might have then said, they would not transfer their money. The Third Circuit has recently held that ERISA plan participants have an affirmative obligation to read plan documents. *Jordan*, 116 F.3d 1005, 1997 U.S. App. LEXIS 14801, at *35 ("We recognize that participants have a duty to inform themselves of the details provided in their plan.") (emphasis added). Unisys met its disclosure obligations and, further, any claimed non-disclosure could not possibly have caused the participants harm.

29. Moreover, plaintiffs did not submit any evidence of the damages supposedly caused by the claimed non-disclosures. Again, plaintiffs' damages expert's testimony was limited to determining what damages were caused to the Plan as a result of the alleged imprudence attendant to the initial purchase of the Executive Life GICs. See supra. ERISA section 502(a) (2), and its counterpart section 409, contemplate remedies solely in favor of

an ERISA plan, following a finding of breach (and a finding that the breach caused harm to the Plan). *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985) ("And the entire text of § 409 persuades that Congress did not intend that section to authorize any relief except for the plan itself."). A participant may bring an individual claim for fiduciary breach and damages stemming from an alleged misrepresentation and/or non-disclosure, under ERISA section 502(a) (3), if any damages are owed to that participant, and not the plan. *Varity Corp.*, 116 S. Ct. at 1076 ("The words of subsection three [502(a)(3)] – 'appropriate equitable relief' to 'redress' any 'act or practice which violates any provision of this title' – are broad enough to cover individual relief for breach of a fiduciary obligation.").

30. To the extent that these plaintiffs are suing for Unisys' alleged misrepresentations and/or non-disclosures, these claims are individual claims actionable only under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). The Court of Appeals in Unisys so held:

> In re Unisys Corp. Retiree Medical Benefit "ERISA" *Litigation*, 57 F.3d 1255 (3d Cir. 1955, we also reaffirmed our conclusion in *Bixler*, 12 F.3d at 1298, that under section 1132(a)(3) of ERISA, equitable relief is available to an individual harmed by a breach of fiduciary duty. 57 F.3d at 1266-69. The issue of relief is not raised in this appeal.

Unisys, 74 F.3d at 442 n. 17.

31. Again, plaintiffs' expert admitted that he did no such individualized damages calculation under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), and plaintiffs'

counsel admittedly did not proffer such a calculation. Absent proof of damages, there can be no finding of fiduciary breach. Mira, 107 F.3d at 473 (absent proof of actual economic loss, no remedy proper under ERISA).

D. The Plan was Adequately Diversified

32. Plaintiffs further allege that Unisys failed to diversify adequately these investments. Whether a fiduciary has prudently diversified a plan will ultimately depend upon the facts and circumstances of each case, and not a particular arithmetic formula. *Unisys*, 74 F.3d at 438. Again, and as the statute makes clear, a fiduciary must "diversify[ ] the investments of the plan so as to minimize the risk of large losses." 29 U.S.C. § 1104(a)(1)(C) (emphasis added). Plaintiffs offered no expert testimony on the appropriate structure of the Unisys portfolio. Dr. Gottheimer was not tendered as an expert on this issue. This failure in proof is an additional ground for the entry of judgment in defendants' favor on the diversification claim.

33. Plaintiffs have offered no proof, expert or otherwise, that the alleged failure to diversify somehow caused any losses at all, let alone the "large" losses required under 29 U.S.C. § 1109(a). Again, plaintiffs' expert admitted that he did no analysis of the damages claimed as a result of the alleged failure to diversify. In that regard, it should be noted that the Court of Appeals, in the Unisys opinion, cited to the Restatement (Second) of Trusts § 228, and the accompanying commentary, on the duty to diversify. See *Unisys*, 74 F.3d at 438 n.13. The commentary further reveals that a fiduciary can be held

liable for failing to diversify only to the extent that such actions can be said to have caused some unique loss flowing specifically from the alleged failure to diversify:

> Extent of liability. If a breach of trust consists only in investing too large an amount in a single security or type of security, the trustee is liable only for such loss as results from the investment of the excess beyond the amount which it would have been proper so to invest.

Restatement (Second) of Trusts § 228 cmt.h (1959) (emphasis added). Again, plaintiffs offered no proof on the specific calculations needed under 29 U.S.C. § 1104(a)(1)(c) and the Restatement; hence, there can be no finding of liability on these grounds. Moreover, the Executive Life contracts totaled some 20% on April 11, 1991, the relevant date for examining the diversification claim.[38] The portfolio was properly diversified.

E. There are No Damages Stemming from the Initial Investment

34. This finding also bears upon the question of whether any damages are attributable to the initial decision to invest in Executive Life. The proper inquiry into whether any harm has been suffered by participants looks to the performance of the portfolio in the aggregate, here the ICF and FIF, and not to the performance of the individual contracts. E.g., *Leigh v. Engle*, 858 F.2d 361, 368

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[38] Again because of ERISA's causation requirements, the Court's diversification inquiry properly focuses on the amount of the Executive Life holdings in the portfolio on the date that the California regulators moved against the insurer.

(7th Cir. 1988) (where fiduciaries seek to create a diversified portfolio, "it makes sense for courts to look at the whole portfolio to determine the investment strategy's success."), cert. denied, 489 U.S. 1078, 109 S. Ct. 1528, 103 L. Ed. 2d 833 (1989). See also 29 C.F.R. 2550.404a-1(b)(2) (DOL regulation recognizing that pension investments should be structured as "part of the portfolio"); Robert J. Aalberts and Perry S. Poon, The New Prudent Investor Rule and the Modern Portfolio Theory, 34 Am. Bus. L.J. 39, 46 (1996) ("[ERISA] also sanctioned diversification of investments, and therefore by implication, the modern portfolio view in which investors are encouraged to consider total return and total portfolio performance in governing pension plans.").

35. Indeed, the Restatement (Third) of Trusts similarly embraces the portfolio theory and incorporates it into the modern standard for determining whether a fiduciary breach has occurred (and the calculation of damages). The Restatement further explains that the modern prudent investor standard "requires the exercise of reasonable care, skill and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust." Restatement (Third) of Trusts § 227(a) (emphasis added).[39]

36. Again, the aggregate performance of the FIF and ICF exceeded all appropriate comparison benchmarks. As

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[39] The Third Circuit recently cited restatement section 227 with approval in Moench, 62 F.3d at 571.

such, there was no fiduciary breach in selecting Executive Life for inclusion in the Savings Plan and, further, plaintiffs have suffered no damages.

F. ERISA Section 404(c) Absolves Unisys

37. Unisys cannot be found liable for another reason, ERISA section 404(c). ERISA provides that, in certain instances, a fiduciary cannot be held liable for fiduciary breach, even upon a finding that the participants' actions caused the alleged loss:

> (c) Control over assets by participant or beneficiary
>
> In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) –
>
> > (1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and
> >
> > (2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or fiduciary's exercise of control.

29 U.S.C. § 1104(c). According to the Third Circuit, "The parties agree that the Unisys Savings Plan is an 'individual account plan' within the meaning of [ERISA]." *Unisys*, 74 F.3d at 426 n.1.

38. The Unisys Court also held that section 404(c) may relieve Unisys from liability, even if the initial selection of Executive Life was somehow imprudent. "There is nothing in section 1104(c) which suggests that a breach on the part of a fiduciary bars it from asserting section 1104(c)'s application." *Id.* at 445.

39. The Court of Appeals explained further the showing necessary to a finding that 404(c) applies:

> For Unisys to prevail under section 1104(c), however, it must establish that the Plans provided information sufficient for the average participant to understand and access: the control the Plans permitted a participant to exercise and the financial consequences he or she assumed by exercising that control; the rights that ERISA provided to participants and the obligations that the Act imposed upon fiduciaries; the Plans' terms and operating procedures; the alternative funds the Plans offered; the investments in which assets in each fund were placed; the financial condition and performance of the investments; and developments which materially affected the financial status of the investments.

Unisys, 74 F.3d at 447. In other words, Unisys must show proof "that a participant's or a beneficiary's control was a cause-in-fact, as well as a substantial contributing factor in bringing about the loss incurred." *Id.* At 445 (citation omitted).

40. As described above, the participants admit that they, alone, were responsible for their investment choices and affirmatively elected to stay with Executive Life, in

the face of abundant ongoing public information regarding the problems at the insurer. In that regard, I note again the specific testimony of Mr. Silver, describing the efforts to which he and Mr. Zylla went to be certain that other participants timely transferred their money out of the FIF and ICF. Even if there was a finding of fiduciary breach in the first instance, which I do not find, ERISA section 404(c) absolves Unisys from plaintiffs' claims to [sic] fiduciary breach.

41. To the extent that the Court of Appeals determines that any of the foregoing Conclusions of Law are Findings of Fact, I hereby adopt said Conclusions of Law as Findings of Fact.

42. To the extent that the Court of Appeals determines that any of the foregoing Findings of Fact are Conclusions of Law, I hereby adopt said Findings of Fact as Conclusions of Law.

FINAL JUDGMENT

AND NOW, this 24th day of November, 1997, upon consideration of the foregoing Findings of Fact and Conclusions of Law, JUDGMENT is entered in favor of all Defendants and against all Plaintiffs.

BY THE COURT:

HERBERT J. HUTTON, J.

IN RE: UNISYS SAVINGS PLAN LITIGATION JOHN P. MEINHARDT, on behalf of himself and all others similarly situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-03067); BERNARD MCDEVITT, on behalf of himself and all others similarly situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-03126); PARKER C. KEAN, on behalf of himself and all others similarly situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-03164); MICHAEL HECK; JOSEPH MCCARTHY; ANGELO DEPIETRO, on behalf of themselves and all others similarly situated v. UNISYS CORPORATION; THE ADMINISTRATIVE COMMITTEE OF THE UNISYS SAVINGS PLAN; THE INVESTMENT COMMITTEE OF THE UNISYS SAVINGS PLAN; JACK A. BLAINE; JOHN J. LOUGHLIN; KENNETH MILLER; DAVID A. WHITE; STEFAN RIESENFELD (E.D. PA. Civil No. 91-cv-03276); GARY VALA, individually and on behalf of all others similarly situated v. JACK A. BLAINE; MICHAEL R. LOSEY; JOHN J. LOUGHLIN; KENNETH L. MILLER; STEFAN C. RIESENFELD; CURTIS A. HESSLER; DAVID A WHITE; UNISYS CORPORATION; THE NORTHERN TRUST COMPANY (E.D. PA. Civil No. 91-cv-03278); CAROLYN A. GOHLIKE, on behalf of herself and all others similarly situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-03321); NADIA F. SOS; FAROUK M. SOS, individually and on behalf of all others similarly situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-03582); KENNETH GOERS; JOHN J. CIESLICKI, on behalf of themselves and all others similarly situated v. UNISYS CORPORATION; THE NORTHERN TRUST COMPANY (E.D. PA. Civil No. 91-cv-04678); DENNIS C. STANGA; JAMES M. COLLINS, on behalf of themselves and all others similarly situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-04689); JOHN H. BURGESS, JR., on behalf of himself and all others similarly

situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-04696); WILLIAM TORKILDSON v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-04754); John M. Meinhardt, Michael Heck, Joseph McCarthy, Angelo DiPietro, Gary Vala, Carolyn Gohlike, Dennis C. Stanga, James M. Collins, John H. Burgess, Jr., Bernard McDevitt, Parker Kean, Nadia F. Sos, Farouk M. Sos, Kenneth Goers, John J. Cieslicki, and William Torkildson, plaintiffs in the above-listed actions, individually and on behalf of the class certified by Order of the district court entered on January 28, 1992 in Master File Civil Action No. 91-3067, Appellants No. 98-1037 IN RE: UNISYS SAVINGS PLAN LITIGATION JOHN P. MEINHARDT, on behalf of himself and all others similarly situated v. UNISYS CORPORATION (E.D. PA. Civil No. 91-cv-03067); HENRY ZYLLA; RICHARD SILVER; RONALD GRIPPO; EDWARD LAWLER; RICHARD ANDUJAR; CLARENCE MULLER; CHARLES WAHLER; JAMES MCLAUGHLIN; DONALD RADER; JOSEPH LAU; JAMES GANGALE; ALFRED CONTARINO; JOHN MARCUCCI; JOSEPH A. FIORE; RICHARD MASTRODOMENICO; NICK KLEMENZ; PETER SZCZYBEK, on behalf of themselves and all others similarly situated; ENGINEERS UNION LOCAL 444 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 445 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 450 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 470 OF THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCALS 165 OF

THE INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, A.F.L.-C.I.O.; LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A.F.L.-C.I.O. v. UNISYS CORPORATION; EDWIN P. GILBERT; JOHN J. LOUGHLIN; THOMAS PENHALE, individually and in their capacities as members of the Unisys Employee Benefits Executive Committee and administrators of the Unisys Retirement Investment Plan; RICHARD H. BIERLY, EDWIN P. GILBERT; CURTIS A. HESSLER; LEON J. LEVEL; KENNETH L. MILLER; DAVID A. WHITE; JACK A. BLAINE; STEFAN C. RIESENFELD; GEORGE T. ROBSON, individually and in their capacities as members of the Investment Committee of the Unisys Retirement Investment Plan (E.D. PA. Civil No. 91-cv-03772); Henry Zylla, Richard Silver, Ronald Grippo, Edward Lawler, Richard Andujar, Clarence Muller, Charles Wahler, James McLaughlin, Donald Rader, Joseph Lau, James Gangale, Alfred Contarino, Richard Colby, John Marcucci, Joseph Fiore, Richard Mastrodomenico, Nick Klemenz and Peter Szczybek, plaintiffs in the above-listed actions, individually and on behalf of the class certified by Order of the district court entered on January 28, 1992 in Master File Civil Action No. 91-3067, Appellants–

No. 98-1007

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

1999 U.S. App. LEXIS 8288

April 30, 1999

April 30, 1999, Filed

PRIOR HISTORY: Original Opinion of March 22, 1999, Reported at: 1999 U.S. App. LEXIS 4863.

COUNSEL: For JOHN M. MEINHARDT, BERNARD MCDEVITT, PARKER KEAN, MICHAEL HECK, JOSEPH MCCARTHY, ANGELO R. DIPIETRO, GARY VALA, CAROLYN GOHLIKE, NADIA F. SOS, FAROUK M. SOS, KENNETH GOERS, JOHN J. CIESLICKI, DENNIS C. STANGA, JAMES M. COLLINS, JOHN H. BURGESS, JR., WILLIAM TORKILDSON, Appellants: James R. Malone, Jr., Michael D. Gottsch, Chimicles & Tikellis, Haverford, PA.

For JOHN M. MEINHARDT, BERNARD MCDEVITT, PARKER KEAN, MICHAEL HECK, JOSEPH MCCARTHY, ANGELO R. DIPIETRO, GARY VALA, CAROLYN GOHLIKE, NADIA F. SOS, FAROUK M. SOS, KENNETH GOERS, JOHN J. CIESLICKI, DENNIS C. STANGA, JAMES M. COLLINS, JOHN H. BURGESS, JR., WILLIAM TORKILDSON, Appellants: Joel C. Meredith, Daniel B. Allanoff, Meredith, Cohen, Greenfogel & Skirnick, Philadelphia, PA.

For UNISYS CORPORATION, THE ADMINISTRATIVE COMMITTEE OF THE UNISYS SAVINGS PLAN, INVESTMENT COMMITTEE OF THE UNISYS SAVINGS PLAN, JACK A. BLAINE, JOHN J. LOUGHLIN, KENNETH L. MILLER, DAVID A. WHITE, STEFAN C. RIESENFELD, MICHAEL R. LOSEY, CURTIS A. HESSLER, Appellees: Brian T. Ortelere, Laurence Z. Shiekman, Pepper, Hamilton & Scheetz, Philadelphia, PA.

For UNISYS CORPORATION, THE ADMINISTRATIVE COMMITTEE OF THE UNISYS SAVINGS PLAN, INVESTMENT COMMITTEE OF THE UNISYS SAVINGS PLAN, JACK A. BLAINE, JOHN J. LOUGHLIN, KENNETH L. MILLER, DAVID A. WHITE, STEFAN C. RIESENFELD, MICHAEL R. LOSEY, CURTIS A. HESSLER, Appellees: Joseph A. Teklits, UNISYS Corporation, Blue Bell, PA.

SECRETARY LABOR, Amicus-appellant: Paul C. Adair, United States Department of Labor, Washington, DC.

JUDGES: Present: BECKER, Chief Judge, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, McKEE, RENDELL, WEIS, * and GARTH, ** Circuit Judges.

OPINION BY: Edward S. Becker

OPINION: SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is DENIED. Chief Judge Becker would grant rehearing en banc.

BY THE COURT:

/s/ Edward S. Becker

Chief Judge

OPINION SUR PETITION FOR REHEARING

GARTH, Circuit Judge: One day after we filed the opinion in this appeal, on March 22, 1999, the Supreme Court rendered its decision in *Kumho Tire Co. v. Carmichael*, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999). *Kumho* directed that the *Daubert* factors be applied equally to non-scientific expert testimony as well as to scientific expert testimony. Although the Petition for Rehearing

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* As to panel rehearing only.

** As to panel rehearing only.

urges that *Kumho* now requires a change in this court's panel majority opinion, we are satisfied that if anything, *Kumho* strengthens our analysis.[1]

It should be noted that this court's majority opinion specifically emphasized that "measured by any standard, scientific or non-scientific, the District Court did not abuse its discretion in excluding Dr. Gottheimer's testimony." Slip Op. at 22. In so stating, we equated non-scientific expert testimony with scientific expert testimony insofar as the *Daubert* factors are concerned. Thus, with the emphasis on a district court's discretion to exclude or to admit expert testimony under *General Electric Co. v. Joiner*, 522 U.S. 136, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997), and *Kumho*, we are not persuaded that the Supreme Court's *Kumho* opinion, which reversed the

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[1] See, e.g. *Kumho* 119 S. Ct. at 1175 ("Our emphasis on the word 'may' thus reflects *Daubert's* description of the Rule 702 inquiry as 'a flexible one.' *Daubert* makes clear that the factors it mentions do not constitute a 'definitive checklist or test.' And *Daubert* adds that the gatekeeping inquiry must be 'tied to the facts of a particular case.') (quoting *Daubert*, 509 U.S. 579 at 591-94); id. ("The factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.") (quoting the brief for the Solicitor General); id. ("[*Daubert's*] list of factors was meant to be helpful, not definitive."); 119 S. Ct. at 1176 ("Our opinion in Joiner makes clear that a court of appeals is to apply an abuse-of-discretion standard when it 'reviews a trial court's decision to admit or exclude expert testimony.' That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion.") (quoting *General Elec. Co. v. Joiner*, 522 U.S. 136, 138-39, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997)).

Eleventh Circuit, requires any modification of our disposition as reflected in Part VI of the filed majority opinion. Judge Weis joins in this opinion.

BY THE COURT:

/s/ Leonard I. Garth

Circuit Judge

Dated: April 30, 1999

28 U.S.C. § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (b) and 1295 of this title.

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

Fed. R. Evid. 702

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937.)

United States District Court for the
Eastern District of Pennsylvania

VOIR DIRE EXAMINATION

[p. 28] THE WITNESS: My name is George M. Gottheimer, G-o-t-t-h-e-i-m-e-r, Jr.

COURT CLERK: Thank you.

VOIR DIRE EXAMINATION

BY MR. MALONE:

Q Could you state your address for the record, please?

A My address is 6 Oechsner, O-e-c-h-s-n-e-r, Court, Berkley Heights, New Jersey.

Q And are you employed, sir?

A I'm employed, yes.

Q Where are you employed?

A I'm employed by Kernan Associates, Inc.

Q What is the business of Kernan Associates, Inc.?

A Kernan Associates, Inc. are insurance and reinsurance consultants.

Q And what's your position with the company?

A I'm president and chief executive officer.

Q How long have you been affiliated with Kernan?

A 10 years, almost 11.

Q Now, you said that the company, I believe, provides insurance and reinsurance consultant services. Can you elaborate on that?

A Yes, we operate in five basic areas. One is reinsurance consulting, where we were consult for insurance companies relative to their reinsurance program.

[p. 29] Q What exactly is reinsurance?

A Reinsurance is insurance of insurance. It's where an insurance company doesn't want to keep all of the liability that is assumed by issuing policies until it lays off a portion of that with another insurance company called a reinsurer.

Q And what types of advice or guidance do you provide the clients in the reinsurance area?

A We provide our clients with a kind of a program they should adopt, what kind of a retention, meaning what should they keep, versus what should they lay off. We do contract analysis, cause the reinsurance is ceded by a contract and some of our assignments are very focused in terms of claims reporting and things like that, underwriting.

Q What other areas of services does your firm provide?

A We do financial reporting for – of insurance companies for our clients, both property and casualty and life and health companies.

Q And what exactly does that entail?

A We analyze the companies that we report on. At the present time we are following on a regular basis

about 160 property and casualty companies and about 35 or 40 life insurance companies.

Q And when you follow these companies, what exactly do you do?

[p. 30] A we [sic] report on them at least once a year. We obtain all of the information that is available on the company, we have access to the NAIC Data Base. We download the data from the NAIC Data Base. We look – we obtain a copy of the company's annual statement as filed with the regulators, plus any supplements to that statement.

We obtain any public information. If the company is owned by a non insurance parent, it's publicly held, we get a copy of the 10K.

Any of the information that has been reported in the trade press, or other financial publications that we subscribe to is in the file. And then we analyze the company based upon that information and provide our clients with the recommendation, both as to the risk of default and as to the credit risk.

Q Now, you used the term NAIC somewhere in response to my last question, could you explain what the NAIC is?

A The NAIC stands for the National Association of Insurance Commissioners. It is a body that is made up of the insurance commissioners in the 50 states, the District of Columbia, Puerto Rico, American Samoa and the Virgin Islands. And they meet four times a year, they're divided into six zones and they send representatives from those zones for examination of companies.

They adopt model acts and in two areas they tell the [p. 31] companies what value should be placed on securities through what is called the SVO, Securities Valuation Office. And they also prescribe what information is to be contained in the annual statement, the annual financial statement that's filed with the regulators.

Q Okay, continuing on with the other types of consulting service that your firm provides, are there other areas?

A We used to teach a plan for insurance companies and intermediaries. We do some risk management, advising corporations on how much risk they should retain.

Q Is that like in the context of a self insurance program?

A Yes, or it could be a captive – captive is an insurance company that's owned by a non insurance parent, basically to write their own risks. And we do some litigation and arbitration work.

Q OKay, can you give me a sense of the types of clients that have retained your firm for its advisory services?

A We've done work for agencies of the Federal Government, Internal Revenue Service is one that comes to mind, we're presently on a job for them.

Q Can you discuss, are you at liberty to discuss the nature of that work?

A No, I'm not, we have a confidentiality agreement with the IRS. We do work for the – some state guarantee

associations, we are presently doing a job for 7 state [p. 32] guarantee associations.

Q Can you give us some sense of what that involves without betraying and [sic] client confidence?

A Yes, each state had a guarantee association which provides benefits to claimants of companies that become insolvent. And we are doing a job for them relative to the insolvency of Mid West Life Insurance Company, which occurred in 1991, I believe.

Q How did you become to be retained for that?

A We were recommended to them, we have done work for the Michigan Life and Health Guarantee Association. We have done work for some others and we were recommended to them.

Q Okay, can you give me some other examples of private clients or public agencies for whom you've provided consulting services?

A We've been retained by the insurance department of the states of Missouri, New York, Pennsylvania, New Jersey, the Attorney General's Office for the State of Washington, those are the ones that come to mind in the public sector.

Privately, we've been retained by some large insurance companies, some small insurance companies.

Q What services have you rendered for the New York Department of Insurance?

A The New York Department of Insurance asked us to go in and evaluate a book of business that was written

by a company [p. 33] that had become insolvent and render an opinion whether or not the managers of the company acted prudently in the way they handled the business.

Q Were you personally involved in that engagement?

A Yes, I was.

Q What work – I believe you said you performed services for the Missouri Department of Insurance?

A Yes, sir.

Q What did that entail?

A We were asked to participate in an examination of the Missouri domestic company, which the insurance department was concerned about. And they did not have anybody in their financial examination team that had expertise in reinsurance.

So, they asked me if I would participate in the examination with their financial examiners on site at the company's office in Missouri.

Q And did you do so?

A Yes, I did and we rendered a report.

Q What types of services have you provided to the Department of Insurance here in the Commonwealth of Pennsylvania?

A In the Commonwealth of Pennsylvania, we train their financial examiners in reinsurance, that was our assignment.

Q And in New Jersey?

A Same thing in New Jersey.

[p. 34] Q Okay, how long have you been in the insurance industry?

A Since 1953.

Q Okay, prior to the time that you were at Kernan, where were you employed?

A I was Senior Vice President of PRO-RE, Inc. of America, which was a reinsurance intermediary firm.

Q Now, what is [sic] a reinsurance intermediary do?

A We placed reinsurance on behalf of our clients who were insurance companies for the most part.

Q Okay, did you have any particular duties or responsibilities at PRO-RE with respect to analysis of insurance companies?

A Well, I manage the Treaty Reinsurance Department, which is the department that dealt with placing reinsurance on behalf of our clients and I was chairman of the Security Committee that approved what insurance companies we would place business with.

Q Now, you use the term treaty reinsurance, can you explain what that means?

A Yes, there are two types of reinsurance, one is called facultative, which is reinsurance on an individual policy, or risk. And the other is treaty which covers an entire class of business or book of business.

Q So a hypothetical insurance company that wanted to lay off all risks on life insurance policies in excess of a [p. 35] million dollars, would that be treaty reinsurance?

A Yes, that would

Q Okay, prior to the time that you were – strike that. How long were you with PRO-RE?

A I was there for two years.

Q Okay and prior to the time that you were at PRO-RE, where were you employed?

A I was with General Re, General Reinsurance Corporation.

Q And what was their business?

A General Reinsurance Corporation is the largest reinsurance company in the United States.

Q And what were your duties and responsibilities at General Re?

A My responsibilities, I managed the insurance and treaty reinsurance operations on the New York Insurance Exchange.

Q Okay, do you have any professional designations or titles in the field of insurance?

A Yes, sir.

Q What are they?

A I'm a charter property casualty underwriter, CPCU. I attained that designation in 1957.

Q And how does one go about – if I wanted to become a CPCU today, what would I have to do?

A You would have to pass 10 examinations, fulfill experience and ethical requirements.

[p. 36] Q Okay, do you have other designations in the field of insurance as well?

A I attained the designation of CLU, Chartered Life Underwriter in 1973.

Q And how does one go about becoming a Chartered Life Underwriter?

A Passed 10 examinations, fulfill the experience and ethical requirements.

Q And do you have any additional designations in the field of insurance?

A I have the designation of Associate in Reinsurance which I attained in 1991.

Q And is there a particular process that applies to obtaining that designation?

A Pass 4 examinations.

Q Do you have any teaching experience in the field of insurance?

A Yes, I do.

Q Can you summarize for the benefit of the Court the nature of the teaching experience that you have?

A I've been on the faculty of the College of Insurance for 25 years.

Q Now, what's the College of Insurance?

A The College of Insurance is a private college that is supported by the insurance industry. It is sponsored by

the [p. 37] Insurance Society of New York, which was founded in 1906. And in 1946 they started the School of Insurance.

In 1962, they got degree granting rights from the Board of Regents of the State of New York. And grant about four different types of degrees, three at the baccalaureate level and one at the masters level.

They're accredited by the Middle States Association of Schools and Colleges, which is the accrediting agency that accredits colleges in this area like Temple and Penn.

Q Okay, now what types of students would normally attend the College of Insurance, or why would someone want to go to the College of Insurance as opposed to –

A We have a very diverse student body. We have a very heavy contingency of foreign students who are sent to the college by their governments or by their companies to study and learn insurance. We have students who are there just to take a particular program.

We have students there who are sponsored by their companies, meaning that they are paid a salary while they go to school and they also work alternating one semester work, one semester at school. It's what we call the work study program.

We have an actuarial science division, which teaches actuarial science both in property and in casualty and in life and health.

[p. 38] Q Upon completion of baccalaureate degree at the College of Insurance, what types of positions in the insurance industry would students be qualified for?

A There are graduates of the College of Insurance that are presidents of insurance companies, presidents of brokerage firms, consultants, a whole group of different high level positions from our graduates.

Q Now, what is your – you may have said this and if you did I apologize. What is your position at the College of Insurance currently?

A I started in 1972 as an adjunct assistant professor, adjunct meaning part time. In 1981, I was appointed adjunct associate profession and I've been an adjunct associate professor since 1981.

On August 31st of this year I will be an associate professor full time, I've received an appointment to the full time faculty.

Q Okay, are there particular courses that you've taught in the field of insurance while you've been affiliated with the College of Insurance?

A Yes.

Q In what areas?

A I teach both in the undergraduate and graduate divisions. In the undergraduate division I teach reinsurance. In the graduate division I teach two [p. 39] reinsurance courses, Principles of Reinsurance and Advanced Reinsurance, which includes financial analysis of insurance companies.

I teach in the graduate division Strategic Planning in Insurance and Current Issues in Management and Insurance. And I also teach a course called Insurance Company Operations in the graduate division.

Q What does the course on insurance company operations involve?

A It is a course that covers both property and casualty and life and health insurance companies and the functions and what they do. Underwriting, marketing, rate making, claims handling, reinsurance, et cetera.

Q Okay, have you taught at any other educational institutions?

A I taught the three years of Boricua [sic] College of the City University of New York.

Q And what did you teach there?

A I taught Insurance Company Operations there.

Q Okay, do you from time to time as part of your consulting work provide educational services as well?

A Yes, I do.

Q Can you give some examples of the types of clients that retain your firm for educational purposes?

A About two weeks ago I was in Bermuda. I was hired by the [p. 40] Bank of Bermuda to talk to their people about reinsurance, because they're concerned about the loans that they make to reinsurance companies.

I'm going to Bermuda again in October for Ernst & Young to do the same thing on an advanced level. I was in Brazil twice last year to do that same thing, to an educational group.

Q Have you received any honors in the field of insurance?

A Yes, I have.

Q Can you describe the nature of the honors that it would award to you?

A In 1982, I was a Loehmann(ph) research fellow, that's a grant that's given by the CPCU, Harry J. Loehmann Foundation.

Q Who is Mr. Loehmann?

A Harry J. Loehmann was the founder of the charter property and casualty movement 1944. He was dean of the Wharton School.

Q At Pennsylvania?

A At the University of Pennsylvania.

Q Okay.

A And –

Q I'm sorry, did you complete – I interrupted you?

A That grant enabled me to do my dissertation for my Ph.D.

Q Are you a member of any professional societies?

A I'm a member of the CPCU Society and the American Society [p. 41] of CLU.

Q Let's talk about your education. Do you have a bachelor's degree?

A I have a bachelor's degree from Edison State College in New Jersey.

Q And what did you major in?

A Insurance.

Q When did you receive that degree?

A 1978.

Q Now, did you spend your whole academic career at Edison, or did you bounce around?

A No, I – when I graduated from high school I matriculated Vanderbilt University in Nashville, Tennessee. I attended Vanderbilt for two years. And didn't really know what I wanted to do. And because of financial hardship of my parents, I decided to go to work.

So, I got in the insurance business and liked it and thought that that was going to be my career, I better learn something about it. So, I started taking insurance courses.

When I finished my CPCU in 1957, I matriculated at Boricua [sic] College at the City University of New York to continue my formal education in – for a bachelor's degree. And I attended Boricua for a year and a half. And then I left the New York area and went to North Carolina to work for a life insurance company. And I got my CLU while I was [p. 42] working for them.

When I came back, I went back to look for – toward finishing my education and that's when I enrolled in Edison.

Q So that you were taking classes at night while you were working?

A All of my education outside of Vanderbilt was at night while I was working, yes.

Q Okay, after you received a bachelor's degree, did you receive any graduate degrees?

A After I received my bachelor's degree from Edison, which is part of the state university system in New Jersey, I matriculated to the College of Insurance to get an MBA.

Q Did you receive an MBA with any particular designation?

A I received an MBA in Insurance Management in 1980.

Q How did you rank in your class at the time you graduated?

A First.

Q Did you receive any other awards or honors in that context?

A I received the MBA medal for attaining the highest academic standing in my class, I'm very proud of that. I also received the MBA medal twice for teaching. That's something that the students select a professor, either full time or adjunct. And I was selected twice by the student body.

Q Now, after you received your MBA, I think you mentioned a [p. 43] dissertation. Did you continue your education after that point?

A After I received my MBA, I had – as a matter of fact before I received my MBA, I had applied to Rutgers University in Newark to enroll in their Ph.D. program in Management.

Q And did –

A I was accepted at Rutgers conditionally, because they saw my record. I had never taken calculus and they thought that that would be a pre-requisite. So, they said if I took a course in calculus and got a B or better they would matriculate me in the Ph.D. program.

So, I went to Pace University, which is the University of New York and I got a B or better and I matriculated at Rutgers. I was in Rutgers for one year and I was working at the same time and I was going to school two nights a week and was teaching. And I found that Rutgers was not going to allow me to do the research in the subject that I was interested in.

So, I decided to look around for some other place. And I found California Coast University in Santa Ana who would allow me to do this work that I wanted to do and so I matriculated there, fulfilled the requirement, wrote a dissertation, I defended it and I got a Ph.D.

Q Now, California Coast, is that an accredited college, or university?

[p. 44] A California Coast University was founded in 1972, 1 believe. It is licensed by the State of California and accredited by an organization called the National Association of Non-Traditional Schools and Colleges.

Q What does that mean, non-traditional.

A It means that they don't have the same residency requirements as other colleges. It is for adults, they never – California Coast University never applied to the Western Association of Colleges and Schools, which is the regional accrediting agency.

They applied to the National Association of Non-Traditional Schools and Colleges and they were accredited in 1977, as a five year requirement.

Q What was involved in terms of your Ph.D. program there? What did you have to do to satisfy that?

A I had to do – the first thing I did was a research of 6 universities who granted Ph.D.'s in my field. And I studied the requirements at Temple, Georgia State, the University of Michigan, Minnesota, Ohio State, to name a few.

And then I was to construct a program in my field that was similar to those programs, but focused in the area that I wanted to do my research in.

Q What area did you do your research in?

A Reinsurance.

Q And I believe you said that you completed your [p. 45] dissertation. Was it ever published?

A Not the entire dissertation, but an abstract from the dissertation was published in the CPCU journal which is the professional journal of the society in December of 1983.

Q Now, have you published other articles in the field of insurance?

A Yes, I have.

Q For what types of journals?

A Most of the articles I have written have been published in Best Review, Best Review is a monthly magazine published by the A.M. Best Company, the same

company that rates insurance companies and by a magazine in London called Reactions, which is a trade magazine for the reinsurance industry.

Q Now, what does it take if I wanted to get an article published in Best Review, can I just do that readily?

A At the time that I had my articles published, I submitted the article, anybody could submit an article to Best and then it was up to the editors to whether or not they would accept the article and if they did they had the right to edit it.

Since that time they've changed the rules. Now, AM – you cannot submit an article to AM Best, they must request from you. Most of their articles now is written by staff people as opposed to practitioners like myself. But on occasion, they will call a practitioner in a certain area and [p. 46] ask them whether they – we will underwrite an article.

Q Now, sir, is part of the work that you do as a consultant involve the analysis of the financial condition of insurance companies?

A Yes, it is.

Q Is that something that people pay you to do?

A Yes, they do.

Q Are there some basic tools that people that are in that line of work employ?

A Yes.

Q Could you explain what they are?

MR. SHIEKMAN: Excuse me, your Honor, are we moving out of the area of voir dire?

MR. MALONE: No, this is still topics of the voir dire.

MR. SHIEKMAN: Okay, fine.

THE WITNESS: What we do in order to analyze the company is as I testified before, we get their annual statement that the file with the regulators. We get the data from the NEIC database. We get 10Ks. We get public information. And based upon all of the – and we also look at all the rating agencies' rating of the company, all that are published.

MR. MALONE: Are you familiar with what the standard of care was in the insurance industry for evaluating the [p. 47] financial conditions of insurance companies in the period of say, from 1985 to approximately early 1988.

MR. SHIEKMAN: Your Honor, I object.

THE COURT: Sustained.

BY MR. MALONE:

Q Let me show you what has been marked as Plaintiff's Exhibit 192.

A Thank you.

Q Can you identify Plaintiff's Exhibit 192?

A That's my curriculum vitae probably prepared around 1994 when I was deposed.

Q As of that time, was it accurate?

A Yes.

Q Okay. Have you ever been qualified as an expert witness?

A Yes.

Q How many times?

A I've been qualified as an expert in insurance in Federal Courts in about – by about 20 Federal Courts. The Court of the District of Columbia, Federal Tax Court and the State Courts, maybe about ten including the Commonwealth of Pennsylvania.

MR. MALONE: Your Honor, we would offer this witness as an expert in the field of insurance. We believe his testimony will aid the Court in addressing the nature of the information and the tools that were available to analyze [p. 48] insurance companies. What would have been shown if those tools had been applied. And what inferences or conclusions could have been drawn from the application of those tools.

THE COURT: Do you wish to inquire as to qualifications?

MR. SHIEKMAN: I do, please, your Honor.

THE COURT: Please come forward.

VOIR DIRE CROSS-EXAMINATION

BY MR. SHIEKMAN:

Q Good morning, Mr. Gottheimer, my name is Larry Shiekman. I think we met at your deposition.

A Yes, we did.

Q Now, this Ph.D. from the California Coast University, when you said it was non-traditional, didn't that mean that you never attended – you were never in residence at the California Coast University?

A That's correct.

Q And isn't it also true that you pay a flat fee and in exchange for that flat fee and in exchange for that flat fee [sic], they award you a Ph.D. upon the completion of whatever requirements you designed?

A No, that's not correct. There is an approval process that you submit the program, it has to be approved. You submit a proposal of the dissertation, that has to be approved. You submit the dissertation, that has to be [p. 49] approved. You have to defend and that has to be approved. And that's signed off by at least two members of your Ph.D. committee.

Q Right, but you pay – you do pay flat fee for that process that you just described, isn't that right?

A You pay a tuition like you pay in any institution, sir.

Q But it's a single payment tuition, isn't that correct? You don't pay by the year or by the course, do you?

A I don't recall whether or not I paid on annual basis, I was matriculated there for a year and a half until I got my degree. So, I don't recall whether or not I paid one annual fee each year or whether I paid one fee, I don't remember.

Q Now, I take it that you didn't have to defend your dissertation in person, did you?

A There was an option of how you defended. You could defend it in person, you could defend it in a telephone conference or you could defend it by answering questions which were proctored. And I chose the latter.

Q Answering questions that were proctored?

A The questions were posed by my committee, they were in writing and I sat down and I had a time limit and it was proctored, yes.

Q But you were in New York and the people who were reviewing the questions were someplace else?

A They were in California, my committee was in California, [p. 50] comprised of the faculty of the university.

Q Now, I take it that none of the courses that you took at Edison had anything to do with life insurance, isn't that right?

A At Edison, no.

Q That's wrong?

A No, I didn't take any insurance courses at Edison.

Q Right.

A I had taken insurance courses and life insurance –

Q I was just asking you about Edison for now.

A At Edison, I did not take any courses in insurance, right.

Q Okay.

A But I received credit for courses I had taken in insurance at other institutions and that's the point I was trying to make, sir.

Q And I take it at Edison you didn't have any courses in ERISA or pension matters, is that right?

A I don't think ERISA was adopted when I was at Edison, I don't recall.

Q Is it also true that at Vanderbilt you didn't take any courses on life insurance?

A At Vanderbilt, no.

Q Now, at City College you didn't take any courses on life insurance or pension matters, did you?

[p. 51] A No.

Q And at the College of Insurance, isn't it true that you generally teach in the reinsurance area?

A I already testified what I teach. If you want me to repeat it, I'll be glad to.

Q Well, I just want to understand. You don't teach all these courses all the time, the ones you mentioned, do you?

A I teach different courses each semester. I teach in the fall for example, I teach the principles of reinsurance in the graduate division. I'll teach insurance company operations in the graduate division. And I'll teach current issues and management. In the spring, I'll teach advanced reinsurance, strategic planning and depending upon

enrollment, insurance company operations again. It depends – it varies from semester to semester, but it's pretty much the same each semester.

Q Well, how about for example, in the fall of '96, do you recall what you were teaching then?

A Sure.

Q Why don't you tell me?

A In the fall of '96, I taught principles of reinsurance and current issues in management and insurance.

Q Let me show you what's been marked as Defendant's Exhibit 2787. And ask if you can identify this for me?

A No, I can't identify that for you.

[p. 52] Q Why don't you take –

A It looks like – I know – I recognize the names from the College of Insurance, my colleagues, but I don't recognize the particular exhibit that you've put in front of me.

Q No, I appreciate that. Why don't you look down and see whether – you're generally familiar with the College of Insurance and who teaches there, I take it?

A I'm very familiar.

Q Great, why don't you look through the list there and confirm for me that that's an accurate listing of the courses that were being offered at the College of Insurance in the fall of 1996?

A I don't know that this encompasses all of them, but it looks like the representative number, yes.

Q Now, none of the classes that you took to obtain your MBA at the College of Insurance focused on life insurance, did they?

A Not the MBA, not that I can remember.

Q And none of the courses that you took in connection with your MBA focused on ERISA or pension matters, isn't that right?

A I believe that's correct. I don't recall any focusing on ERISA.

Q Now, has any of your employment related to the life insurance business?

[p. 53] A Yes.

Q Well, for example, when you worked at PRO-RE and General Re, that wasn't life insurance related, was it?

A Some of it was, yes.

Q On the reinsurance side, not on the primary side?

A Placing reinsurance on behalf of life insurance companies, yes.

Q Right. But it wasn't evaluating the solvency of life insurance companies, was it?

A Well, as Chairman of the Security Committee at PRO-RE, my responsibility was to approve life insurance companies and property casualty companies with whom we would place – recommend to our clients to place business. So, to that extent, I did.

Q Now, you were also employed by the American International Group for awhile?

A Yes, I was with them eight years.

Q And I take it there you never dealt with any financial solvency of life insurance questions?

A No, I did not. It was back in the 60s.

Q And I think you mentioned that you had been qualified as an expert 20 – 20 times I wrote down.

A Approximately.

Q Now, when you say qualified as an expert, do you mean there was a judge sitting in the – up on the bench who said [p. 54] Mr. Gottheimer, you're an expert or do you mean that you were testifying at a deposition or something like that?

A No, a judge was sitting up there who said, I accept you as an expert.

Q Okay. Now, isn't it true that in every case in which you've testified as an expert, that all those assignments related to property and casualty – the property and casualty business?

A I really don't recall whether any of them were on life insurance matters. Most of my work is in property and casualty. I just don't recall. I have been retained for a lot of life insurance matters, but I don't recall whether I actually testified in court on any of them. I just don't remember.

Q You recall that you testified at a deposition in a case involving the Budd Company, don't you?

A Yes.

Q Do you recall testifying there that 24 of the 25 testimonial assignments that you had involved the property and casualty business and not the life insurance business?

A At that time, yes.

Q And that time was 1993?

A Something around that time, yes.

Q Great, can you tell the Court whether you've had any times that you've been qualified as an expert in the life [p. 55] insurance business since 1993?

A When you say qualified, do you mean in court?

Q Yes.

A I just answered that, I cannot remember ever having testified in court on a life insurance case. I've been involved in a lot of cases which I've been deposed on, but not where it leads to trial.

Q Now, isn't it also true that you've never done consulting work for public or private corporations that involved the financial solvency of life insurance companies?

A That's not true.

Q Do you recall that on September 8th of 1994, your deposition was taken in this case?

A I do recall that.

Q Page 53 at the bottom. And do you recall being asked the following question. "Okay, have you done consulting work for public and private corporations involving the financial solvency of life insurance companies?"

Answer, "Not that I can recall, no." Do you recall that testimony?

A Yes, I do.

Q Does that refresh your recollection, Mr. Gottheimer –

A Yes.

Q – that you've never been retained by a public or private corporation, at least, as of 1994, to evaluate the financial solvency of the life insurance company?

[p. 56] A What I said at my deposition was not that I can recall. I can recall one now and since that time, I've done several.

Q But in 1994, you couldn't recall any, now you can recall one?

A I can recall one that I did prior to 1994, yes.

Q All right, so from 1953 when you went in the insurance business until 1994, you can recall one time that you've provided consulting work for a public or private corporation involving the financial solvency of a life insurance company, right?

A That's correct.

Q Isn't it true that you've never advised anyone who was purchasing a guaranteed investment contract?

A That's also correct.

Q Wouldn't you agree that there are significant differences between evaluating a life insurance company and the property and casualty insurance company?

A There are some differences and there are also some similarities in the way we do it.

Q Do you recall also at the September 8th, 1994 deposition on Page 57, Line 12, I asked you the following question. "Okay, by the way, are there fundamental differences between evaluating the solvency of a property and casualty insurer on the one hand a life insurer on the other?" Answer, "Yes." Do you recall that testimony?

[p. 57] A Yes, I do.

Q Now, I take it, today you still agree that the answer is yes, there are significant differences, isn't that right?

A Yes, I do – don't disagree with that. I'm saying that there are also some similarities, too, in certain areas.

MR. SHIEKMAN: That's all I have, your Honor.

THE COURT: Redirect on qualifications?

VOIR DIRE REDIRECT EXAMINATION

BY MR. MALONE:

Q Sir, can you give us some examples of the nature of nature of the consulting assignments that you've had in the life insurance area?

A In 1993, I was retained by the Michigan Life and Health Guaranty Association to go in and evaluate two life insurance companies, Great Lakes American Life Insurance and MidAmerica Life Insurance Company, that had become insolvent in 1991. And the Guaranty Association asked me to go in and do three things. One, to

determine what was the cause of the insolvency. Number two, were there any possible recoveries against third parties. And number three, what recommendations would I make to prevent something like that from happening again. I and two of my associates went to Grand Rapids, Michigan to the home office of the company and we spent three days going through the books and records of the company. And we issued the 74 page report which is [p. 58] public information, giving our findings.

Q How did you get retained for that assignment?

A We were recommended by the Michigan Property and Liability Guaranty Association, who we had done some work for some four or five years prior.

Q Now, have you had other consulting assignments on the life insurance side?

A Yes.

Q Can you give some other examples?

A Well, I already mentioned the one I'm involved with now, which is the MidWest Life Insurance Company. We've been retained by seven guaranty associations to evaluate the responsibilities of a [sic] investment fund that bought single premium deferred annuities from this –

Q Let me just stop you right there. Could you explain what a single premium deferred annuity is for the record?

A A single premium deferred annuity is where the investor pays one premium and the benefits will be paid at some date in the future.

Q Okay.

A Basically, that's what it –

Q Please continue your response.

A I've been involved in that for the last two years and we're waiting for – and I've been deposed – we're waiting for a trial date. The judge that's been assigned to us is [p. 59] the judge that's been a little busy with Mr. McVeigh in Denver.

Q Have you ever been retained to render opinions in the context of GICs?

A Yes, I have.

Q Can you – are you at liberty to discuss the general parameters of what you were asked to opine on?

A I was retained in the Budd Company case as Mr. Shiekman referred to before. I also was retained by Fidelity Investments relative to GICs that were purchased in Confederation Life.

Q And were you asked to testify on behalf of a plaintiff in that case?

A No. That case was settled before I got to that point.

Q Who retained you, the plaintiff or the defendant?

A The defendant on – the defendant retained me.

Q Okay. Now, I believe you were asked whether there are differences between life and health companies on the one hand and property and casualty companies on

the other, with respect to analysis of their financial condition. Can you explain what the similarities and differences of the two types of carriers are?

A Insofar as our evaluation is concerned, we look at the assets of the company and what investments they have. There are differences between what a property and casualty company [p. 60] invests in and what a life and health invests in, in terms of the proportion of their investments. And also, in some cases in the type of investment. But we're still analyzing assets and so, that's the similarity. We're looking at life insurance companies buy [sic] corporate bonds. Property and casualty companies buy corporate bonds. And we evaluate – and there's the similarity. It's that the same type of investment is done by both companies and there are some times that a life insurance company will have an investment that a property and casualty company won't. So, there are both similarities and differences.

Q Is there a general view in the insurance community as to which is the more difficult to make an assessment on the financial condition?

MR. SHIEKMAN: Objection.

THE COURT: Sustained as to form. You can rephrase your question.

BY MR. MALONE:

Q To your knowledge, sir, do people in the insurance industry have a generally prevailing view as to whether it is easier or more difficult to evaluate a life and health company as contrasted with a property and casualty company?

MR. SHIEKMAN: Objection.

THE COURT: He's smiling at me, too.

MR. SHIEKMAN: I can't see his face, your Honor.

[p. 61] THE COURT: Sustained.

MR. MALONE: Is it easier or hard to do property and casualty?

MR. SHIEKMAN: Objection.

THE COURT: Sustained.

THE WITNESS: It's more difficult –

THE COURT: Sir –

THE WITNESS: – I'm sorry. I'm thinking and not listening, your Honor, sorry.

MR. MALONE: I'll stand on that.

THE COURT: All right. Mr. Shiekman?

MR. SHIEKMAN: I just have one question.

VOIR DIRE RECROSS-EXAMINATION

BY MR. SHIEKMAN:

Q Mr. Gottheimer, in the Budd case, I take it you were retained by the plaintiffs who were challenging Budd's purchase of the single premium deferred annuity?

A That's correct.

MR. SHIEKMAN: Your Honor, we object to Mr. Gottheimer's testimony as an expert. His very considerable experience seems to lie in the area of property and

casualty insurance and the area of reinsurance. But to offer him here as an expert in the question about whether Unisys was prudent in the purchase of Executive Life GICs, nothing in his experience training, knowledge or anything seems to bear on [p. 62] that question. And consequently, we object to his testifying on that basis and on that subject.

THE COURT: Rule 702 of the Federal Rules of Evidence states as follows, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."

Sir, the specific issues before me as the trier of fact in this case are inconsistent with your training, your experience, your education, as impressive as it is, it's just not something that I can qualify you as an expert under this rule. However, Rule 701 may be available to the plaintiffs. I don't know whether or not, I've never read the deposition or anything, so I don't know. But as regards qualification at this time, under 702, the Court declines.

Did you want to take a break and then tell me after the break where we're going to go from here?

MR. SHIEKMAN: That's fine, your Honor.

MR. MALONE: Thank you, your Honor.

(Court in recess at this time.)

THE COURT: Gentlemen. Yes, sir?

MR. MALONE: In terms of the record, your Honor, first, we'd like to move into evidence Exhibit – Plaintiff's [p. 63] Exhibit 192, which is the CV of Mr. Gottheimer.

THE COURT: So ordered.

(Whereupon Plaintiff's Exhibit 192 was admitted into evidence.)

MR. MALONE: Second, in terms – I'd like to touch very briefly on the 702 issue, if you'll hear me on that.

THE COURT: I've ruled on that, sir.

MR. MALONE: Okay. I'd like to make a proffer of what the witness' testimony would have been as an expert. For purposes of the record, I'll try and be brief.

THE COURT: Go right ahead.

MR. MALONE: We have offered the witness, testimony to establish, sir, that in the insurance industry, there are some standard tools of tests that are performed in conducting an analysis of the financial condition of insurance companies, both life and health, and property and casualty, in terms of ratios that are generated from the annual statement, tests prescribed by the National Association of Insurance Commissioners, and the Best leverage and liquidity and profitability ratios.

The witness has performed those tests in his own capacity in the past. He has performed them with respect to Executive Life, based upon information that was available prior to the time of the three bids in question. He is

able to interpret the tests. He is familiar with the tests. And [p. 64] his testimony would establish that the tests set up certain red flags that should have caused a person familiar with the tests and performing the tests, to ask further questions about the solvency and the credit worthiness of Executive Life. And that would be our proffer on that subject.

* * *